INDEX

CITATIONS

Cases:

Cases—Continued — Page

Statutes:

Statutes—Continued Page

In the Supreme Court of the United States

OCTOBER TERM, 1973

No.

UNITED STATES OF AMERICA, APPELLANT

v.

CITIZENS AND SOUTHERN NATIONAL BANK, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

JURISDICTIONAL STATEMENT

OPINION BELOW

The district court's findings of fact, conclusions of law and order (App. A, *infra*, pp. 1a-69a) are not reported.

JURISDICTION

The judgment of the district court (App. A, *infra*, p. 69a) was entered on January 25, 1974. The notice of appeal to this Court (App. C, *infra*, pp. 73a-74a)

was filed on March 25, 1974. On April 16, 1974, Mr. Justice Powell extended the time for docketing the appeal to June 24, 1974. The jurisdiction of this Court is conferred by Section 2 of the Expediting Act, 15 U.S.C. 29. *United States* v. *Phillipsburg National Bank*, 399 U.S. 350; *United States* v. *First National Bancorporation, Inc.*, 410 U.S. 577.

QUESTIONS PRESENTED

1. Whether an arrangement whereby each of six separate and independent banks operated as a *de facto* branch of a larger independent bank competing in the same markets, resulting in interchanges of information, personnel and other resources and a lack of competition, violates Section 1 of the Sherman Act.

2. Whether the Bank Holding Company Act of 1956 ousts antitrust courts of jurisdiction to determine the foregoing question, by vesting exclusive jurisdiction over such issues in the Board of Governors of the Federal Reserve System.

3. Whether the acquisition by the largest bank in the Atlanta area of five independent banks there, which are not acting as competitors because they have undertaken to operate as its *de facto* branches, violates Section 7 of the Clayton Act.

STATUTES INVOLVED

Section 7 of the Clayton Act, 38 Stat. 731, as amended, 15 U.S.C. 18; Section 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 1; and Subsection 5(B) of the Bank Merger Act of 1966, 80

Stat. 8, as amended, 12 U.S.C. 1828(c)(5)(B), are set forth in Appendix E, *infra*, pp. 88a-89a.

STATEMENT

The United States filed this civil antitrust action challenging (1) the relationship between the Citizens and Southern banking organization ("C&S" or the "C&S System"), the largest banking system in Atlanta, Georgia, and six legally independent banks in the Atlanta suburbs, which voluntarily operate as *de facto* branches of C&S, as violating Section 1 of the Sherman Act, and (2) C&S's proposed acquisition of five of these banks, pursuant to agreements entered into in 1970, as violating Section 7 of the Clayton Act. After trial on the merits, the district court dismissed the complaint (App. A, *infra*, pp. 1a-69a).

A. THE DEFENDANTS

1. *The Citizens and Southern Banking System.* The C&S System consists of Citizens and Southern National Bank ("C&S National"), its wholly-owned subsidiary Citizens and Southern Holding Company ("C&S Holding"), and eight banks operating in Georgia in which C&S Holding owns a majority stock interest (App. A, *infra*, pp. 2a-3a; DX 266, p. 116[1]).

C&S National, the lead bank in the C&S System, is also a registered bank holding company under federal law (App. A, *infra*, p. 2a). See 12 U.S.C. 1844(a). Its home office is in Savannah but it operates more than 60 banking offices in six Georgia cities,

[1] "DX" refers to appellees' exhibits; "GX" refers to government exhibits.

about 40 of which are located in the Atlanta area (App. A, *infra*, p. 2a).

Through C&S Holding, the C&S System presently owns a majority stock interest in three state chartered banks in the Atlanta area.[2] The acquisitions challenged are to be made by two of these banks: "C&S Emory" and "C&S East Point."

As of June 30, 1970, C&S's combined assets of $1.7 billion, combined deposits of $1.4 billion, and combined loans and discounts of $1.1 billion made it Georgia's largest bank system. In the Atlanta area, C&S on December 31, 1971, had deposits of approximately $1 billion. Its 30 percent share of the total deposits held by the 31 banking organizations operating there made it the largest in the Atlanta area (App. A, *infra*, pp. 2a, 38a-40a).

2. *C&S's Special Relationships with the Suburban Banks.* Between 1957 and 1969, C&S assisted in the organization of a number of independent banks in the Atlanta suburbs. C&S acquired at least a five

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[2] The three banks and their resources as of December 31, 1970, are: (1) The Citizens and Southern Emory Bank ("C&S Emory"), with four offices in DeKalb County, and assets of $42.3 million, deposits of $35.4 million, and loans and discounts of $28.5 million; (2) the Citizens and Southern Bank of East Point ("C&S East Point"), with four offices in Fulton County, and assets of $28.4 million, deposits of $23.3 million, and loans and discounts of $22.9 million; and (3) the Citizens and Southern DeKalb Bank ("C&S DeKalb"), with two offices in DeKalb County, and assets of $28.4 million, deposits of $23.5 million and total loans and discounts of $22.9 million (App. A, *infra*, pp. 3a-4a). C&S DeKalb is not a defendant in this action since it is not a party to any of the proposed acquisitions (see p. 10, *infra*, n. 6).

percent stock interest in these banks and they are sometimes referred to as the "five percent banks." From their beginnings the banks maintained not only a correspondent relationship but also an operating relationship with C&S so close that they soon began to behave as its *de facto* branches. See *infra*, pp. 10, 18-21. It is not disputed, however, that they were legally independent; that the fiduciary obligation of the management of each five percent bank was to all of that bank's stockholders and not only to C&S; that each bank retained independent decision-making power; and that to the extent their management submitted to the direction of C&S, they acted voluntarily.

One such bank, the Bank of Stone Mountain, was organized in 1957 with C&S's assistance; in 1959 C&S acquired five percent of Stone Mountain's stock and in 1966 the bank became known as the "C&S Bank of Stone Mountain." That bank, however, later declined to be acquired by C&S and it has since become completely independent of C&S's influence and no longer uses the C&S name. (Tr. 180-181, 184, 188, 204-224, 534A-536, 597-598, 682.)

Of the six institutions involved here, one, the Tucker Bank, chartered in 1919, was in existence long before its association with C&S. It has been operated as part of the C&S System since 1965, when C&S Holding purchased five percent of its stock and it adopted the name "Citizens and Southern Bank of Tucker." (App. A, *infra*, pp. 5a, 15a-16a; DX 267, pp. 1-2.) It is involved only in the Sherman Act aspect of this case, because the Federal Deposit In-

surance Corporation ("FDIC") disapproved its acquisition by C&S, although its relationship as a *de facto* branch continues.[3]

The five remaining suburban banks all were organized with C&S's assistance and it acquired a five percent interest in them at the time they were organized. Each bank has "a large number of shareholders * * * and no single shareholder owns a significant number of the shares of any such bank" (App. A, *infra*, p. 43a).

Sandy Springs. Sandy Springs is a community adjoining the north side of the City of Atlanta in Fulton County. The Citizens National Bank of Sandy Springs was organized in 1959 and began operating in 1960. In 1969 it converted from a national to a state-chartered bank and adopted the name Citizens and Southern Bank of Sandy Springs. It has one office, and had total assets of $22 million, deposits of $19 million and net loans and discounts of $11.7 million as of December 31, 1970 (*id.* at 5a-6a).

Chamblee. Chamblee is located in DeKalb County northeast of Atlanta. The Chamblee National Bank was organized in 1960. In 1969 it converted from a national to a state-chartered bank and adopted the name Citizens and Southern Bank of Chamblee. It has two offices, and had total assets of $21.1 million, deposits of $18.7 million, and loans and dis-

[3] The FDIC characterized the relationship between C&S and Tucker Bank as being "anticompetitive in its origins" but assumed that it could be terminated only by compulsory process (GX 33D).

counts of $10.7 million as of December 31, 1970 (*id.* at 4a).

North Fulton. The Citizens and Southern Bank of North Fulton, a state-chartered bank, was organized in a community in Fulton County north of Atlanta. It has one office, and had total assets of $7.7 million, deposits of $6.3 million and loans and discounts of $5.6 million as of December 31, 1970 (*id.* at 5a).

Park National. Citizens and Southern Park National Bank was organized in 1967 in Executive Park, located in DeKalb County north of Atlanta. It has one office, and had assets of $11.1 million, deposits of $9.8 million, and loans and discounts of $3.5 million as of December 31, 1970 (*id.* at 4a).

South DeKalb. Citizens and Southern South DeKalb Bank was organized in 1969 in DeKalb County southeast of Atlanta. It has two offices, and had total assets of $5.1 million, deposits of $4.3 million, and loans and discounts of $2.1 million as of December 31, 1970 (*id.* at 4a-5a).

B. GEORGIA BANKING LAW AND C&S's ATTEMPTS TO EXPAND.

C&S contends that it was using its close relationship with the five percent banks as a substitute for *de novo* expansion which was not permitted by state law. Prior to 1927, Georgia permitted statewide branching. At that time, C&S had three branches in Atlanta. In that year Georgia prohibited branching, but in 1929 it modified the absolute restriction to

permit branching only in cities in which the bank's home office was located. C&S, as a Savannah-based company, was therefore unable to branch further in the Atlanta area. In 1965 Georgia authorized branching within the limits of any city where a bank had any offices; in 1970 it extended this limit, effective in 1971, to any county in which the bank has any office (Ga. Code Ann. 13-203(c) (Cum. Supp., 1972)), making the challenged acquisitions possible under state law (App. A, *infra*, pp. 7a-9a).

The Georgia Bank Holding Company Act, enacted in 1956, prohibited any holding company from acquiring more than fifteen percent of a bank's stock (Ga. L. 1956, pp. 309-312); a 1960 amendment further limited such companies to five percent. Ga. Code Ann. 13-207(a).[4] (See App. A, *infra*, p. 8a.)

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[4] C&S had maintained a degree of indirect control over other banks in Georgia in which it held a five percent stock interest. C&S's direct and indirect control over ten "five percent" banks located in various parts of Georgia, including one of the banks involved here, South DeKalb, was challenged in *Independent Bankers Ass'n of Georgia, Inc.* v. *Dunn*, 230 Ga. 345, 197 S.E. 2d 129. The Supreme Court of Georgia held that the C&S System had exceeded the five percent stock limitation provided in Georgia law, and that C&S was indirectly controlling more than five percent of the stock because of "the action of certain * * * [C&S] officers and directors in acquiring such stock, selling it to selected individuals and trusts, and in treating such banks as branch banks of Citizens and Southern." *Citizens & S. Nat'l Bank* v. *Independent Bankers Ass'n of Georgia, Inc.*, 202 S.E. 2d 78, 80 (Ga.).

C. THE ATLANTA BANKING MARKETS

The Clayton Act count alleged that the proposed acquisitions may substantially lessen competition and would increase concentration (a) in the Atlanta area, consisting of the city of Atlanta and the two counties it straddles, DeKalb and Fulton; (b) in DeKalb and Fulton Counties separately; and (c) in north Fulton County. Within each of the government's proposed markets, which the district court accepted for "purposes of discussion" (*id.* at 30a-31a), commercial banking is highly concentrated. For example, in the Atlanta area, the top two banks had 53.2 percent of total deposits and the top four, 84.2 percent. The merger would increase these levels of concentration by two percent, would raise C&S's share as market leader from 30 to 32 percent and would reduce the total number of banking organizations in the Atlanta area market from 31 to 26. Similar effects would occur in each of the other markets.[5]

D. THE ACQUISITION PROPOSAL, COMPETITIVE REPORTS, AND THE FEDERAL DEPOSIT INSURANCE CORPORATION'S DECISION

In 1970 C&S applied to the FDIC, pursuant to 12 U.S.C. 1828(c), for approval of its proposed acquisitions of the six "five percent" banks described above

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[5] Tables setting forth concentration levels and the effect of the merger upon them in each market are contained in the district court's findings (App. A, *infra*, pp. 31a-40a).

(DX 266, 267).* The applications asserted that the banks to be acquired (termed "correspondent associates" by C&S) are "virtually operated and directed as *de facto* branches in the C&S system," that their "[s]tockholders, customers and competitors have recognized that fact," that the proposed acquisitions "can produce no anti-competitive results * * * since no change is contemplated—except as to form," and that, since no competition exists between C&S and the correspondent associates, no competition could be eliminated by the proposed acquisitions (DX 266, pp. 2-3; DX 267, pp. 2-3).

The Department of Justice, the Board of Governors of the Federal Reserve System, and the Comptroller of the Currency submitted competitive reports to the FDIC concerning the proposed acquisitions (GX 38, DX 318, DX 317), pursuant to 12 U.S.C. 1828 (c)(4). The Board of Governors and the Comptroller reported that the acquisitions would not have

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* The applications actually were filed by two C&S subsidiaries: C&S East Point proposed to acquire Sandy Springs Bank and North Fulton Bank, and C&S Emory proposed to acquire Chamblee Bank, Park National Bank, South DeKalb Bank and Tucker Bank. Since a substantial majority of the two acquiring subsidiaries' stock is owned by C&S Holding, the proposed acquisitions are in substance acquisitions by C&S and have been consistently treated as such (App. A, *infra*, p. 6a). As each of the banks in a "non-member [of the Federal Reserve System] insured bank," FDIC is responsible for approving the acquisitions in the first instance. 12 U.S.C. 1828(c)(2)(C).

anticompetitive effects. The Department, after initially also so reporting, except as to Tucker Bank, made a further investigation and then concluded that all six of the proposed acquisitions "would have a significantly adverse effect on competition" (GX 38, p. 17).[7]

On October 4, 1971, the FDIC approved the acquisition by C&S of the five affiliated banks it had assisted in organizing (GX 33B, 33C), concluding that they do not and never did compete with each other or with C&S (GX 33B, p. 2; GX 33C, p. 2). It disapproved, however, the acquisition of the Tucker Bank (GX 33D).

E. THE DISTRICT COURT'S DECISION

On November 2, 1971, within the 30-day statutory period for such suits (12 U.S.C. 1828(c)(6), (7)), the United States filed this action, under Section 7 of the Clayton Act, to enjoin consummation of the

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[7] The Department had initially reported that the acquisition by C&S of the five banks C&S had assisted in organizing would have no adverse effect on competition because they had always been "affiliated" with C&S, but that the acquisition of Tucker Bank would injure competition because it had previously been independent. The initial reports were based on the erroneous assumption that, from the time they were organized, C&S completely controlled the "affiliated" banks it sought to acquire and that the latter banks had never been independent competitors. A subsequent field investigation, prompted by information received after the initial reports were submitted, revealed that the assumption of complete control was not correct (GX 38, pp. 3-4).

five acquisitions approved by the FDIC;[8] the complaint also sought to enjoin the violations of Section 1 of the Sherman Act which it alleged existed by virtue of the close working relationships and arrangements among C&S and the six "correspondent associates" (including Tucker Bank). Pursuant to 12 U.S.C. 1828(c)(7)(A), the commencement of the action automatically stayed consummation of the acquisitions. The district court (Moye, J.) subsequently denied appellees' motion to lift the stay prior to trial.

Following a trial on the merits, the district court entered judgment for the appellees on both the Section 1 and the Section 7 claims.

1. *The Sherman Act Claims.* The district court held that the Board of Governors of the Federal Reserve System had "exclusive primary jurisdiction" under the Bank Holding Company Act, 70 Stat. 133, as amended (12 U.S.C. 1841, *et seq.*) over all questions presented under the Sherman Act concerning the legality of the relationship between C&S and the six "five percent" banks. Citing *Whitney National Bank* v. *Bank of New Orleans & Trust Co.*, 379 U.S. 411, 419, it ruled that the doctrine of "exclusive primary jurisdiction is applicable * * * not only to questions of organization, but also to questions of operation of banks by holding companies" (App. A, *infra*, p. 26a).

Alternatively, it held that no violation of Section 1 had been established. It made no finding as to

[8] The FDIC did not exercise its statutory right (12 U.S.C. 1828(c)(7)(D)) to intervene as a party defendant.

initial responsibility for organization of the five banks in whose creation C&S had participated, but noted that "C&S's involvement was prompted by hope that it would be the forerunner of much larger interests in the future. It is also clear that such initial C&S participation effectively precluded *ab initio* any real competition between the C&S system and the five percent defendant banks" (*id.* at 11a). It found that C&S's advice and suggestions with respect to rates, hours of operation, types of loans to discourage, and minimum loan rates were generally followed, but that these activities did not amount to collusive price fixing or market division, and hence were not *per se* violations of Section 1 (*id.* at 23a-25a).

Applying the "rule of reason," the court found no adverse effects upon competition nor any significant difference from an ordinary correspondent relationship between banks. "There is no evidence of record to conclude that the utilization by the five percent defendant banks of the services or information received by them from C&S National or C&S Holding was a result of any tacit or explicit combinations rather than the natural deference of the recipient to information from one with greater expertise or better sources" (*id.* at 29a).[9]

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[9] The court also appears to have concluded that C&S's relationship with the five percent banks had been endorsed by the government in its jurisdictional statement in *United States* v. *Marine Bancorporation, Inc.*, No. 73-38, argued April 23, 1974. It also concluded that in 1968 the Department of Justice had acquiesced in the relationship between C&S and the five percent banks by failing to challenge it after participating in an understanding reached during an investigation by the Federal

2. *The Clayton Act Claims.* Turning to the Clayton Act count, the district court found that the relationship between C&S and each five percent bank "from the very beginning * * * has been much closer than the normal correspondent banking relationship" (App. A, *infra*, p. 49a). "[T]here is no presently existing substantial competition between the five percent defendant banks and C&S National, or *inter sese*, or with third parties which would be affected by the proposed merger" (*id.* at 66a).

Among other things, it found that C&S had been intimately involved in all aspects of the banks' establishment; that the chartering agencies knew that each bank would be affiliated with a large bank, and relied on this in granting a charter; and that C&S officials had stock interests in excess of five percent.[10]

Reserve Board staff to determine whether C&S had violated the Bank Holding Company Act of 1956. The understanding provided that C&S would not be deemed to control a majority of the Board of Directors of a five percent bank by reason of its furnishing a principal operating officer, that officer's purchase of additional shares, or its placing one or two directors on the bank's board, if they were not a majority (see App. A, *infra*, pp. 18a-19a).

[10] The court also held that the Georgia Supreme Court's decision in *Independent Bankers Ass'n of Georgia, Inc.* v. *Dunn*, *supra* (see p. 8, *supra*, n. 4), did not affect its determination (App. A, *infra*, pp. 66a-68a). Following remand of that case, the State Commissioner of Banking and Finance issued an order on May 22, 1974, to implement the decision (App. D, *infra*, pp. 75a-87a). That order, among other things, provided that C&S must terminate supervision of the five percent banks beyond that which is available to any other bank wishing to enter a correspondent relationship; that no C&S officer or director may serve as a director or officer of a five

The court found that C&S had: furnished the president and other managing officials of each bank; selected directors; arranged for the banks to use the C&S name and logo to increase their public identification with C&S; provided accounting services; set up the same credit administration and controls as for C&S branches; provided for regular credit meetings with C&S officers and affiliates; furnished the five percent banks with C&S guides and manuals; provided an advisory director to meet with each bank's board of directors; supervised their operations through C&S's branch supervision department; and arranged for customer services to be handled as if each bank were a branch of C&S.

The court found that this relationship "is principally a matter of such intangible factors as the intentions of the principals, and that stock ownership is merely one manifestation along with various implementing operating procedures. * * * [I]t makes no difference whether this absence of competition results from a legally effective stock ownership control

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percent bank; that certain C&S officers and directors who acquired stock in the five percent banks under certain conditions must divest that stock; that C&S Holding must divest its stock in the five percent banks if that stock, together with stock held by C&S National shareholders in the five percent bank, exceeds five percent of the stock of the latter bank; and that signs, advertising and similar written materials disseminated by a five percent bank must distinguish that bank from C&S, if the C&S logo is used.

On June 3, 1974, the district court ruled that the Commissioner's order did not affect its decision, and it amended its original order, *nunc pro tunc*, accordingly (App. B, *infra*, pp. 70a-72a).

as in [*United States* v. *Trans Texas Bancorporation, Inc.*, 1972 Trade Cases para. 74,257 (W.D. Tex.), affirmed, 412 U.S. 946], or from the more intangible factors present here" (App. A, *infra*, pp. 65a-66a). On this basis it concluded that none of the acquisitions violated Section 7.

THE QUESTIONS ARE SUBSTANTIAL

This appeal presents substantial questions relating to (1) the legality under Section 1 of the Sherman Act of arrangements under which price and service competition has been eliminated among a large bank and smaller independent banks, in the organization of some of which the large bank had assisted, and (2) the legality under Section 7 of the Clayton Act of the large bank's acquisition of such affiliates. These questions are of substantial importance to the banking community and to the administration of the antitrust laws.

In this case six banks have voluntarily undertaken to conduct themselves as *de facto* branches of a larger banking organization competing in the same markets. The banks are in law and in fact independent business entities, except to the extent that their managements have voluntarily agreed to conduct their banking activities as if they were branch offices of the larger bank. Such a mutual arrangement goes far beyond any ordinary correspondent relationship, for it eliminates all meaningful price and service competition among C&S and the six banks. Whether it be called "*de facto* branching" or "voluntary con-

trol," it is a combination or agreement that violates Section 1 of the Sherman Act.

C&S's assistance in the organization of five of the banks does not result in an exception from the Sherman Act for this conduct. Sponsorship or assistance of a new bank by an established bank is often a necessity for the new bank's organizers, and a sound business practice for the established bank, because it offers the possibility for developing a profitable correspondent relationship. Small banks may also become targets for acquisition by their sponsors as a means of entry into new markets. Thus, sponsorship or assistance to new banks may be both lawful and pro-competitive, provided that the banks are operated as *bona fide* independent institutions which do not determine their competitive conduct jointly with competing institutions. In this case, however, these conditions were not met. Instead, independent banks, which should have competed against C&S in the Atlanta area, voluntarily became its vassals in violation of the law.

Section 7 of the Clayton Act prohibits C&S from making permanent the present anticompetitive arrangement by acquiring any of the five banks. Under well-recognized criteria governing mergers between direct competitors, their elimination as independent institutions would result in a probable lessening of competition. The banks' voluntary elimination of competition among themselves prior to the acquisitions, in violation of the Sherman Act, does not constitute a defense to the Clayton Act charge.

1. The record and the district court's findings show a violation of Section 1 of the Sherman Act.

Each of the six suburban banks was, legally and factually, an independent business entity which C&S was not entitled to control. C&S holds only a five percent stock interest in the banks and, under Georgia law, cannot directly or indirectly own or control a greater percentage. Indeed, its conduct in treating its "five percent banks" as branch banks was one of the factors which led the Georgia Supreme Court to conclude that it was indirectly controlling more stock than state law permitted. *Citizens & S. Nat'l Bank* v. *Independent Bankers Ass'n of Georgia, Inc.*, 202 S.E. 2d 78, 80.

The Tucker Bank competed independently long before its association with C&S. The other five banks' stock is held by individuals who may not lawfully act as agents of C&S in the banks' affairs. Moreover, C&S has always denied having the power to control the five percent banks.

In 1968, C&S National's president advised the Federal Reserve Board staff that C&S influenced, but did not control, the five percent banks, which were always free to pursue their own interests.[11]

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[11] Mr. Mills B. Lane, Jr., stated that "[t]he five percent investment followed the identical philosophy of my father of influencing but not controlling the correspondent bank relationship" (GX 177, p. 8). He also stated that "I look on the use of the name Citizens and Southern [by the five percent banks] as identity with the strong institution, not with control * * *" (*id.* at 11). In response to a question as to what assurance C&S had that a five percent bank using the C&S

This is borne out by the record. Each bank has an independent board of directors whose members are not officers, employees or directors of C&S or of other banks. The directors and chief executive officers of the banks deny that C&S may dictate policies or practices to them, or control their actions.[12] They follow C&S's advice only when they believe it is in the best interests of their banks.[13] In the words of the regional administrator of national banks, "while they are under the aegis of the C&S national; yes, I must say they are independent organizations" (Tr. 829).

Nevertheless, the district court's findings show, as the appellees claimed, these independent banks have voluntarily submitted to C&S's direction and they conduct themselves as *de facto* branches of the C&S system. The district court found this direction and control so pervasive—extending even to supervision of the banks by C&S's own branch department (see p. 15, *supra*)—that it left no "existing substantial competition between the five percent defendant

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name would not engage in activities which would reflect adversely on the name, Mr. Lane acknowledged that "[t]hat is the gamble we have taken. The only misgiving I ever had about our *lack of control* is the use of this name" (*id.* at 15; emphasis supplied).

[12] Cook Dep., pp. 21-22; Lane Dep., p. 23; Connelly Dep., p. 17; W. Berry Dep., p. 91; Harris Dep., pp. 27-28; Hazelrig Dep., pp. 16-17; see Tr. 704.

[13] Cook Dep. pp. 21-22; Lane Dep., p. 58; Connelly Dep., p. 28; W. Berry Dep., p. 90; Harris Dep., pp. 21-22; Hazelrig Dep., pp. 26-28.

banks and C&S National * * *" (App. A, *infra*, p. 66a). That finding, made for purposes of the Clayton Act aspect of the case, establishes that the arrangements have eliminated all meaningful price and service competition. That finding undermines the court's conclusion that the activities of C&S and the five percent banks did not unreasonably restrain trade in violation of the Sherman Act.[14] See, *e.g.*, *United States* v. *Topco Assocs., Inc.*, 405 U.S. 596, 606-608; *Northern Pac. Ry.* v. *United States*, 356 U.S. 1, 5.

The district court held that the arrangements between C&S and the five percent banks were not agreements or combinations within the meaning of Section 1 of the Sherman Act (App. A, *infra*, p. 29a). Yet the entire course of conduct between the banks and C&S reflected in each case a mutual understanding that the five percent bank would act jointly and interdependently with C&S. There would have been no other reason for them to permit an advisory director to sit upon their boards of directors, for C&S to supply them with guides and manuals, for C&S's branch supervisor to oversee them, or for them to hold them-

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[14] This is not the district court's only inconsistency. In discussing the Sherman Act count the court stated that there was no significant difference between an ordinary correspondent relationship and the relationship between C&S and the five percent banks (App. A, *infra*, p. 28a), but in discussing the Clayton Act count the court concluded the relationship had been much closer than the normal correspondent relationship (*id.* at 49a).

selves out to the public under the C&S name and logo as interchangeable parts of the C&S System.

It was understood by all that this arrangement was voluntary. "There was of course freedom to withdraw from the agreement," just as there was in *United States* v. *Container Corp.*, 393 U.S. 333, 335. In fact, the five percent bank that C&S had helped organize at Stone Mountain did just that (see p. 5, *supra*). But, far from showing the absence of an agreement or combination, this freedom to withdraw confirms the factual and legal independence of the five percent banks. Thus, as in *Container*, the necessary agreement or combination was inherent in the banks' course of conduct, and the district court misconceived this Court's decisions [15] in failing to recognize it.

The district court also appears to have reasoned that, with the exception of the Tucker Bank, which the court did not specifically discuss, the relationship between C&S and the five other banks was lawful because C&S had provided them with very substantial assistance when they were established, and that, from the beginning, they voluntarily had refrained from competing with C&S. But, as we have shown, from the beginning they were also independent business entities which C&S could not control; C&S's

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[15] *E.g.*, *United States* v. *Container Corp.*, *supra*; *United States* v. *Parke, Davis & Co.*, 362 U.S. 29; *Interstate Circuit, Inc.* v. *United States*, 306 U.S. 208; *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 221, 224, n. 59; *United States* v. *Singer Mfg. Co.*, 374 U.S. 174, 193-195.

hopes and the banks' joint non-competitive behavior are legally immaterial. The Sherman Act would be undermined if, as the district court reasoned, competition among independent entities was "principally a matter of such intangible factors as the intentions of the principals" (App. A, *infra*, p. 65a). Under the district court's standard, any separate firms in the same industry could agree not to compete and then use the resulting lack of competition to defend a merger which, because of the market shares involved, would otherwise be unlawful under Section 7.

It follows that, whether initiative for establishment of the banks came from C&S or from local businessmen, or, as in the case of Tucker, the bank had long been in existence, their voluntary decision to act as branches of C&S and C&S's agreement to treat them as such violated the Sherman Act. Without deciding who initiated the new banks, the district court found that C&S and many of the principals and stockholders at least hoped that one day C&S would have "larger interests" (App. A, *infra*, pp. 10a-11a). But such a hope cannot be implemented through an agreement not to compete.

Appellees contended below, at least as to the five sponsored banks, that the rule should be different because the relationships were created "at a time when full branching or ownership was not permitted to C&S" (App. A, *infra*, p. 22a). But this assertion simply confirms the impropriety of their resort to a "*de facto*" branching relationship which state law prohibited. See p. 8, *supra*, n.4. There is a material

difference between assisting a new bank to become established as a *bona fide* independent institution, in the hope of one day acquiring it, and, as was done here, entering into a *de facto* branching relationship with such a bank upon its establishment.

New banks often require substantial financial and technical assistance from other banks in order to become established.[16] Such assistance includes aid in preparing the charter application, finding a chief executive officer, acquiring and training personnel, site location, advertising and promotions, and pension and profit sharing administration, as well as general counseling, loan participation with the new bank, and other matters (Tr. 54-64, 119-120). A large bank's usual motive for such organizational assistance is to obtain the new bank's correspondent business; as a sponsoring or assisting bank, it has a substantial advantage in this respect (Tr. 54-55, 120). A bank may also sponsor a new bank in the hope of acquiring it at a later time as a means of entering a new market.[17]

The relationship between a newly-organized bank and its sponsoring or assisting bank is not, however, exempt from the antitrust laws. They cannot agree not to compete. Rather, they may undertake a normal correspondent relationship which does not re-

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[16] This is confirmed by testimony of officials from other large Atlanta banks who have assisted in the organization of new banks (Tr. 52-54, 119-120; see Tr. 909-910). The availability of this kind of assistance is a factor relied upon by bank regulatory authorities (App. A, *infra*, pp. 46a-49a).

[17] See pp. 29-32, *infra*.

strain competition between them. The relationships here went far beyond that,[18] and thus violated Section 1.

2. The district court's conclusion that the Bank Holding Act of 1956, 70 Stat. 133, as amended (12 U.S.C. 1841, *et seq.*) vested in the Federal Reserve Board "exclusive primary jurisdiction" over the conduct underlying the Sherman Act claim in this case is erroneous.

The district court appears to have confused the concepts of "exclusive" and "primary" administrative jurisdiction. The Board does not have "exclusive" jurisdiction. The Bank Holding Company Act does not authorize the Federal Reserve Board to approve and immunize conduct that would violate Section 1 of the Sherman Act, except for an "acquisition, merger or consolidation transaction" approved by the Board under 12 U.S.C. 1842(c). See 12 U.S.C. 1849(b). If not challenged within 30 days, such a transaction may be consummated and may not thereafter be attacked in any judicial proceeding on the

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[18] A correspondent banking relationship is essentially a vertical relationship between banks in which a large bank furnishes services to a smaller bank, and the smaller bank agrees to maintain a "correspondent balance" with the larger bank or pays it an agreed fee (see Tr. 11-44, 91-113, 153-160, GX 193, GX 194). Although the correspondent services might include a number of the types of services made available by C&S to the five percent banks, an ordinary correspondent bank would not subject itself to C&S's direction, would not regularly interchange officers and employees with C&S, would not use the C&S name or hold itself out as part of the C&S System, and would not be so linked with C&S as not to compete with banks in the C&S System.

ground that it alone and of itself violates any antitrust law (except the provisions against monopoly). 12 U.S.C. 1849(b).

The Act expressly provides, however, that, except for the foregoing, "[n]othing herein contained shall be interpreted or construed as approving any act, action, or conduct which is or has been or may be in violation of existing law, nor shall anything herein contained constitute a defense to any action, suit, or proceeding pending or hereafter instituted on account of any prohibited antitrust or monopolistic act, action or conduct * * *." 12 U.S.C. 1849(a).

If the district court meant that the relationships among the banks should have been first examined by the Federal Reserve Board under the doctrine of "primary" jurisdiction, and thereafter considered by the court, it also erred. First, as the court itself recognized (App. A, *infra*, pp. 16a-20a) in 1968 the Federal Reserve Board staff conducted an investigation of C&S's relationship with the five percent banks under the Bank Holding Company Act and concluded that no control of the kind then specified in the Act existed (see pp. 13-14, *supra*, n.9, 18).

In addition, the Act contains no provision calling for any determination by the Board relevant to any issues in this antitrust case. The Board's jurisdiction over relationships between a bank holding company and existing banks depends upon whether the holding company has "control" over the bank, as defined in Section 2(a) of the Act (12 U.S.C. 1841(a)), *i.e.*, by direct or indirect power to vote 25 percent or

more of the bank's stock; or by controlling, directly or indirectly, election of a majority of the bank's directors; or, since the 1970 amendments of the Act (84 Stat. 1761), by directly or indirectly exercising a controlling influence over the management or policies of the bank.

Liability under the antitrust laws, however, is not governed by questions of control of the kind decided by the Board under the Holding Company Act. It depends, rather, on relationships that eliminate or threaten to eliminate competition. Thus, in *United States* v. *E. I. du Pont de Nemours & Co.*, 353 U.S. 586, this Court's decision did not turn on whether du Pont's stock interest in General Motors gave it "control" of that company; it was enough that its interest enabled it sufficiently to influence General Motors' actions or policies to result in a reasonable probability of anticompetitive consequences. *Id.* at 598-605.

This court has required preliminary reference of Sherman Act issues to regulatory agencies only where the agency's decision on an issue within its jurisdiction would be directly relevant to later judicial determination of a claim or defense under the antitrust laws.[19] However, as used in the applicable provisions of the Bank Holding Company Act (see pp. 25-26, *supra*), "control" is not an element of the antitrust claim here, and Congress has expressly provided that determinations under that Act relating to "control" do not create an antitrust defense.

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[19] *E.g.*, *Ricci* v. *Chicago Mercantile Exch.*, 409 U.S. 289.

The district court's reliance upon *Whitney National Bank* v. *Bank of New Orleans & Trust Co.*, 379 U.S. 411, was misplaced. That case did not involve relationships between existing banks claimed to violate the antitrust laws, but rather a question of the proper forum in which to litigate the legality, under state branching law, of the organization of a new bank by a bank holding company. Opponents of the new bank sought to litigate their claims in a suit to enjoin the Comptroller from issuing a charter for the bank, without waiting for the Federal Reserve Board to determine whether the holding company acquisition would violate state branching restrictions.

This Court held that, in those circumstances, since the issues raised were "cognizable by the Federal Reserve Board," proceedings before the Board were "the sole means by which questions as to the organization or operation of a new bank by a bank holding company may be tested." *Id.* at 419. There was no suggestion, however, that all questions concerning relationships among existing banks must automatically be referred to the Board, particularly when, as here, the questions do not involve issues cognizable by the Board.

3. Under established market share criteria, C&S's acquisition of the five percent banks would violate Section 7 of the Clayton Act. *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321; *United States* v. *Phillipsburg Nat'l Bank*, 399 U.S. 350. The district

court rejected this analysis solely on the ground that the banks are not presently competing, concluding that it made no difference whether the absence of competition resulted from legally effective stock ownership or control, or from the voluntary arrangement of the parties.

The district court apparently believed this result compelled by this Court's summary affirmance in *United States* v. *Trans Texas Bancorporation, Inc.*, *supra*. But, in *Trans Texas* the district court had found that the combining banks were not independent competitive entities, because a closely-knit group of stockholders had always controlled their competitive behavior in such a way that the banks never had the capacity to make independent decisions. The *Trans Texas* decision did not suggest that banks with that capacity—like the five percent banks here—could agree with another bank not to exercise it.

The standard applied by the district court here means, in effect, that, after eliminating competition between themselves in violation of the Sherman Act, firms may make their anticompetitive relationship permanent by merging. Although the district court did not expressly hold that conduct that otherwise violates the Sherman Act may serve as a defense in justification of an acquisition otherwise unlawful under the Clayton Act, its reading of *Trans Texas* extends that case far beyond its facts.

The court's decision here disregards fundamental stock ownership concepts upon which corporate law depends, and substitutes a standard wholly dependent

on the subjective intention of unidentified "principals" to compete or not compete. The antitrust laws cannot be effectively administered on this basis.[20] The district court's approach introduces needless uncertainty and invites violations of both the Sherman Act and the Clayton Act.

4. There is no inconsistency between the United States' contentions in this case, that the operating relationships between C&S and the five percent banks violated Section 1 of the Sherman Act and that C&S's acquisition of those banks would violate Section 7 of the Clayton Act, and the position it has taken in *United States* v. *Marine Bancorporation, Inc.*, No. 73-78, argued April 23, 1974. The major question in *Marine Bancorporation* is whether the acquisition by a Seattle bank of a Spokane bank violated Section 7 because it eliminated the Seattle bank as a potential entrant into the Spokane market. We argued that the Seattle bank could have entered the Spokane market without acquiring a major bank there, either by making a so-called foothold acquisition of a smaller

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[20] Since the firms in this case are independent entities, the case does not present the question whether less than majority stock control could ever result, for antitrust purpose, in loss of a firm's legal status as an independent entity. Even wholly-owned corporate subsidiaries, however, may be treated as separate entities if they so represent themselves to the public. See, *e.g.*, *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 215; *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 141-142. Here, conversely, independent firms have held themselves out as branches of another firm. But this does "not save them from any of the obligations that the law imposes on separate entities." *Ibid.*

bank or by sponsoring a new bank in Spokane and subsequently acquiring it. We explained that the sponsorship method required that the sponsored bank "must be operated for a period of time as a *bona fide* and independent institution, although it may be affiliated with its sponsor for purposes of correspondent relationships and other inter-bank services, including financial support," and that the Seattle bank "[i]n effect * * * would be establishing its own target for a foothold acquisition in Spokane, and pending its eventual acquisition, * * * could assist it in branching in the city" (Brief for the United States, No. 73-38, pp. 17, 50).

The sponsorship method we there suggested, by which the Seattle bank would have supported a new bank to be operated "as a *bona fide* and independent institution," is a far cry from the relationship between C&S and the five percent banks it sponsored. Although those banks were separate and independent legal entities, C&S effectively directed their banking policies, practices and operations and treated them for all practical purposes as though they were its branches. C&S made no attempt to treat those banks as "*bona fide* and independent" institutions. The relationship that exists between C&S and five percent banks would not constitute the kind of "sponsorship" we proposed in *Marine Bancorporation* as an appropriate method for entering the Spokane market.

In his brief in *Marine Bancorporation*, the Comptroller of the Currency argued (Br. pp. 46-48, n. 34, 100) that the sponsorship technique would not be a

"reasonable business practice" because the *C&S* case (as well as the *Trans Texas* case, *supra*) suggested that the government might challenge both the sponsorship of the bank and its subsequent acquisition as violating Section 7 of the Clayton Act and Section 1 of the Sherman Act. In its reply brief the United States distinguished those cases on the ground that the combination of two banks operating in different markets, which would be the case in *Marine Bancorporation*, was "a very different situation" from "the acquisition of affiliated banks operating in the same market as the acquiring bank" (Reply Br., p. 2). The United States also pointed out (*ibid.*):

> Moreover, nothing in the relationship between such banks would violate Section 1 of the Sherman Act, as long as the sponsored bank operates as a *bona fide* independent institution, *i.e.*, one which determines its banking practices unilaterally rather than jointly with its competitors.

Our submission to this Court in *Marine Bancorporation* made it clear that sponsorship would be a permissible method of entry only if the sponsored bank was operated as "a *bona fide* and independent institution * * * which determines its banking practices unilaterally rather than jointly with its competitors." If the relationship between the sponsoring and sponsored banks involved such a degree of influence of the latter by the former as to constitute a violation of Section 1 of the Sherman Act, then obviously sponsorship would not be a permissible method of entry. Similarly, if the subsequent acquisition of

the sponsored bank involved something more than a mere "foothold acquisition," it would not be immune from challenge under Section 7.

CONCLUSION

For the reasons stated, probable jurisdiction should be noted.

Respectfully submitted.

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JUNE 1974.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

Civil Action No. 15823

[Filed in Clerk's Office, Jan. 25, 1974, Ben H. Carter, Clerk, by [Illegible], Deputy Clerk]

UNITED STATES OF AMERICA, PLAINTIFF

v.

CITIZENS AND SOUTHERN NATIONAL BANK, ET AL., DEFENDANTS

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

INTRODUCTION

A. *The Proceeding and the Parties*

This action, instituted by the United States of America ("the Government") under Section 15 of the Clayton Act, as amended [15 U.S.C. § 25], seeks injunctive relief to prevent and restrain alleged violations of Section 7 of the Clayton Act, as amended [15 U.S.C. § 18], which would result from the consummation of contemplated mergers within the Atlanta Metropolitan Area which are described below. The Government also alleges violations of Section 1 of the Sherman Act [15 U.S.C. § 1] and seeks injunctive relief under Section 4 of that Act [15 U.S.C. § 4].

The defendants, who oppose the relief sought by the Government, are:

1. The Citizens and Southern National Bank ("C&S National"), formerly the Citizens and Southern Bank, a state bank with headquarters in Savannah, Georgia, itself, a product of the merger of the Citizens Bank of Savannah and the Southern Bank of Georgia in 1906. In 1927 the Citizens and Southern Bank was converted to a national banking association which presently exists under the laws of the United States. C&S National presently has over 60 banking offices in six Georgia cities, about 40 of which are located in Fulton and DeKalb Counties. While the home office of C&S National is located in Savannah, its principal executive, actual headquarters and principal place of business are located in Atlanta, Fulton County, Georgia. C&S National is registered under the laws of the United States as a bank holding company by virtue of its ownership of The Citizens and Southern Holding Company ("C&S Holding," *infra*). As of June 30, 1970, C&S National had total assets of approximately 1.7 billion dollars, total deposits of 1.4 billion dollars, and net loans and discounts of 1.1 billion dollars.

2. C&S Holding, a wholly-owned subsidiary of C&S National, was organized in 1927 and is a registered bank holding company existing under the laws of the state of Georgia having its home office and principal place of business in

Atlanta, Georgia. It owns a majority stock interest in several Georgia banks, including three located in the Atlanta area—The Citizens and Southern Emory Bank ("Emory"), The Citizens and Southern Bank of East Point ("East Point"), and the Citizens and Southern DeKalb Bank ("DeKalb"). The latter, DeKalb, is not a defendant, but since it is a part of the overall C&S system of banks in the area involved herein, it is relevant to note that DeKalb presently has two offices, both located in DeKalb County, and as of December 31, 1970, had total assets of 28.4 million dollars, deposits of 23.5 million dollars and total loans and discounts of 22.9 million dollars.

3. Emory, a 95 percent-owned subsidiary of C&S Holding, is a state banking corporation with its headquarters and principal place of business in a residential area of DeKalb County, Georgia, near Emory University. It presently has four offices, all located in DeKalb County. As of December 31, 1970, Emory had total assets of approximately 42.3 million dollars and total loans and discounts of 28.5 million dollars.

4. East Point, a 90 percent-owned subsidiary of C&S Holding, is a state banking corporation with its principal place of business and headquarters in the suburban community of East Point, Fulton County, Georgia. It has four offices, all located in Fulton County. As of December 31, 1970, it had total assets of 28.4 million

dollars, total deposits of 23.3 million dollars, and total loans and discounts of 22.9 million dollars.

5. The Citizens and Southern Chamblee Bank ("Chamblee") is a state banking corporation with its principal place of business and headquarters located in Chamblee in the northern part of DeKalb County, Georgia. It was originally organized in 1960 as a national banking association. In 1969 Chamblee converted into a state-chartered bank and adopted its present name. Chamblee has two offices, both located in DeKalb County. As of December 31, 1970, it had total assets of 21.1 million dollars, total deposits of 18.7 million dollars and total loans and discounts of 10.7 million dollars.

6. The Citizens and Southern Park National Bank ("Park National") is a national banking association located in the Executive Park area of DeKalb County, Georgia. As of December 31, 1970, it had total assets of 11.1 million dollars, total deposits of 9.8 million dollars and total loans and discounts of 3.5 million dollars.

7. The Citizens and Southern South DeKalb Bank ("South DeKalb") is a state banking corporation located in the Candler-Glenwood area of DeKalb County, Georgia. South DeKalb was organized in 1969. At the time of trial it operated one office in DeKalb County and had approval to open an additional office, also in DeKalb County, which was actually opened in No-

vember, 1972. As of December 31, 1970, South DeKalb had total assets of 5.1 million dollars, total deposits of 4.3 million dollars and total loans and discounts of 2.1 million dollars.

8. The Citizens and Southern Bank of Tucker ("Tucker") is a state banking corporation having its principal place of business and headquarters at Tucker, DeKalb County, Georgia. Tucker was chartered as the Bank of Tucker in 1919, and existed as such until 1965, when C&S Holding purchased five percent of its stock, and Tucker adopted its present name. Tucker operates two offices, both in DeKalb County. As of December 31, 1970, it had total assets of 26.5 million dollars, total deposits of 23 million dollars, and total loans and discounts of 14.8 million dollars.

9. The Citizens and Southern Bank of North Fulton ("North Fulton") is a state banking corporation and has its only office in Roswell in the northern part of Fulton County, Georgia. It has pending an application for authority to open an additional office to be located in Alpharetta, also in Fulton County, Georgia. As of December 31, 1970, it had total assets of 7.7 million dollars, total deposits of 6.3 million dollars and net loans and discounts of 5.6 million dollars.

10. The Citizens and Southern Bank of Sandy Springs ("Sandy Springs") is a state banking corporation having its only office in Sandy Springs, a suburban community north of Atlanta

in Fulton County, Georgia. Sandy Springs was organized as a national banking association in December, 1959, as the Citizens National Bank of Sandy Springs. In October, 1969, Sandy Springs converted to a state chartered bank and adopted its present name. As of December 31, 1970, it had total assets of 22 million dollars, total deposits of 19 million dollars and net loans and discounts of 11.7 million dollars.

All defendant banks concededly are engaged in interstate commerce.

In September 1970, Emory entered into agreements to acquire all the assets and assume all the liabilities of Chamblee, South DeKalb, Park National and Tucker. Concurrently, East Point entered into similar agreements with North Fulton and Sandy Springs. All agreements were approved by the stockholders and directors of the banks involved, and, except for the Emory-Tucker agreement, all were approved by the Federal Deposit Insurance Corporation ("FDIC"), the appropriate federal regulatory agency. Since C&S National owns C&S Holding, and since C&S Holding owns 95 percent of the stock of Emory and East Point, the proposed transactions are, in substance, acquisitions by C&S National and will be so treated by the Court.

Within the time provided by law, the Department of Justice brought this suit pursuant to Section 7 of the Clayton Act to enjoin the five mergers approved by the FDIC and the mergers were automatically

stayed. [12 U.S.C. § 1849(b)] The Government also seeks to enjoin, as a violation of Section 1 of the Sherman Act, the operation of Chamblee, Park National, South DeKalb, Tucker, North Fulton and Sandy Springs as part of the overall C&S system, contending that there is a concerted activity of exchanging, on a formal and continuing basis, detailed information as to past, present and future competitive policies and practices which constitutes combinations between and among each of these banks and C&S National. The Court will sometimes refer to these six banks as the "five percent defendants" because C&S Holding owns five percent of the stock of each of those banks—the maximum permitted by Georgia law.

All defendant banks transact business and are located within the Northern District of Georgia which is within the geographical jurisdiction of this Court.

B. *Background of this Litigation*

1. *History of Banking Laws in Georgia*

The banks involved in this litigation are the subject of concurrent state and federal regulation by multiple regulatory authorities operating under numerous regulatory statutes. Some of the banking laws of Georgia are particularly relevant to consideration of the issues herein.

Prior to 1927, Georgia's branch banking laws contained no limitation on the geographic areas in which banks could open branches. New branches, however, required the approval of the

State Superintendent of Banks. In 1927 the establishment of additional branch banks was absolutely prohibited, regardless of location, but in 1929 the laws were again amended to permit banks to open branches in cities in which their "home offices" were located.

Georgia's branch banking laws were further amended in 1965 to permit banks to branch throughout cities in which they might be located, regardless of the location of their "home office," and, since 1971, banks have been permitted to branch throughout the counties in which they are located.

In 1956 the Georgia Bank Holding Company Act was enacted. Under that law, bank holding companies were initially limited to the future acquisition of only 15 percent of the stock of a bank. Since 1960, however, Georgia law has prohibited Georgia bank holding companies from acquiring more than five percent of the stock of a bank.

In *Independent Bankers Assn. of Georgia, Inc.* v. *Dunn, et al.*, 230 Ga. 345 (1973), the Supreme Court construed the five percent law [Georgia Laws 1960, p. 67 ff; Ga. Code Ann. § 13-207(b)] and held that stock owned by shareholders, officers and directors of the bank holding company must be attributed to the holding company for purposes of complying with the five percent limitation. [230 Ga. at 362]

2. *History of the C&S Bank in the Atlanta Area*

C&S National opened its first branch in Atlanta in 1919, at a time when Georgia law contained no limitations as to the geographic areas in which banks could open branches.

When the Georgia banking laws were changed in 1929 so as to permit branching by banks only in cities in which their "home offices" were located, C&S National, with its home office in Savannah, Georgia, was prohibited from further branching in Atlanta although its competitors with home offices in Atlanta were permitted to open branches throughout the city. Thus for the period 1930-1960, thirty-one years, C&S National was confined to the three branches it had opened in Atlanta prior to the 1927 "freeze."

In an effort to avoid the above state restrictions on branch banking, C&S National formed C&S Holding in 1927. In 1946 C&S Holding acquired the stock of East Point. In 1950 C&S National and C&S Holding organized Emory to extend C&S banking services to an area of residential and collegiate growth in DeKalb County. And in 1954 C&S Holding acquired the stock of DeKalb, which is located in the unincorporated Avondale Estates community in DeKalb County. Since the creation or acquisition of these banks, C&S National and/or C&S Holding have owned virtually all of their stock.

East Point, Emory, and DeKalb became part of the C&S system at a time when Georgia laws

restricted branch banking, but contained no limitations on bank holding company expansion. The enactment of the Georgia Bank Holding Company Act in 1956, and its amendment in 1960 to prohibit acquisition of more than five percent of the stock of a bank, did not affect C&S Holding's ownership of East Point, Emory and DeKalb, but applied only to future acquisitions. After 1971, of course, C&S National could establish, and has established, branches outside the city limits of Atlanta in both Fulton and DeKalb Counties.

Due to the restrictions described above, in 1959 C&S National began its association with what were termed at trial as "Correspondent Associate Banks," usually referred to herein as the "five percent defendants." They are Sandy Springs, North Fulton, Park National, Chamblee and South DeKalb. C&S National's association with each of the above five percent defendant banks commenced at their inception. Whether the organization of these banks was the "brain child" of C&S National, or of local leaders, in each instance is the subject of some dispute between the plaintiff and defendants—but the record is clear that C&S National and/or C&S Holding participated substantially in the creation of each five percent defendant bank. The record also demonstrates that such participation was undertaken because C&S had no other legal opportunity available to it at that time to enter

the market areas involved, and that C&S's involvement was prompted by hope that it would be the forerunner of much larger interests in the future. It is also clear that such initial C&S participation effectively precluded *ab initio* any real competition between the C&S system and the five percent defendant banks. For example, the assumption of the bank regulators that C&S National would be responsible for the management of the five percent defendants was instrumental in their chartering of those banks. And it is contrary to experience that a profit-making corporation voluntarily creates competition for itself.

The only "Correspondent Associate Bank" in Fulton and DeKalb Counties which C&S National and/or C&S Holding did not participate in the creation of is C&S Tucker. That bank became a correspondent associate of C&S in 1965 when its owners requested C&S National to provide it management. The FDIC did not approve the proposed merger of Tucker with Emory because it concluded that the 1965 acquisition by C&S Holding of effective control of the then independent Bank of Tucker was anticompetitive. As noted above, however, the FDIC did approve the proposed mergers involving Sandy Springs, Chamblee, Park National, North Fulton and South DeKalb.

Basic to the FDIC's approval of the proposed mergers were the following findings (Gx33B; Gx33C):

> "The banks involved in the proposed mergers do not compete today and never have competed in the past.
>
> * * * *
>
> "Under these circumstances, the proposed mergers of these . . . 5 percent banks into a majority-owned C&S subsidiary would not eliminate any existing competition between them or between either bank and any other C&S unit. Such mergers would not alter the existing competitive structure . . . in any way or add to the concentration of banking resources now held by the C&S system.
>
> * * * *
>
> "Furthermore, the Corporation finds no reasonable probability that [the 5% banks] would become disassociated from the C&S system in the future if the proposed mergers are denied.
>
> * * * *
>
> "If voluntary disaffiliation represents no more than an unlikely possibility, the Corporation finds itself unable to conclude that the proposed mergers would eliminate any significant potential for increased competition between the [5% banks] or between either of them and the rest of the C&S system banks."

The FDIC concurrently approved one branch application by East Point in Fulton County, and one by Emory in DeKalb County, but denied six of Emory's DeKalb County branch applications because it concluded that "competitive considerations outweigh the limited benefit that might accrue to the public from the existence of the additional facilities."

C. *The Contentions of the Parties and the Issues Before the Court*

In the discussion which follows the Court will first consider the Sherman Act issues and then the Clayton Act charges relating to the proposed mergers.

As a prelude, the Court notes that Section 7 of the Clayton Act [15 U.S.C. § 18] would prohibit the proposed mergers if their effect would be "substantially to lessen competition, or tend to create a monopoly" (1) "in any line of commerce" (2) "in any section of the country." In this case there is no contention that the proposed acquisitions would "tend to create a monopoly." Nor is there any issue as to what is the appropriate "line of commerce." Prior decisions of the Supreme Court foreclose any determination other than that it is "commercial banking" [1]—a determination with which defendants are

[1] *United States* v. *Philadelphia National Bank*, 374 U.S. 321 (1963), in which the Court held that "the cluster of products (various kinds of credit) and services (such as checking accounts and trust administration) denoted by the

in factual and legal disagreement, although they recognize its inevitability. Thus the Section 7 issues are:

> 1. What is the appropriate "section(s) of the country" to be considered in connection with the proposed mergers?
>
> and
>
> 2. Will the proposed merger(s) "substantially lessen competition" in that "section(s) of the country"?

With respect to the Sherman Act allegations, defendants not only deny any combination in restraint of trade but also contend that the relationships among the banks involved are governed by the Bank Holding Company Act, 12 U.S.C. § 1841, *et seq.*, particularly Section 3 thereof, with which defendants say they have fully complied. Additionally, defendants contend that the Federal Reserve Board ("FRB") has primary jurisdiction of the Sherman Act allegations and that the Department of Justice is not a proper party to raise a claim based thereon.

With respect to the Clayton Act charges, defendants proffer the following defenses: that there is no substantial actual competition which will be eliminated by the proposed mergers, that the proposed mergers are in fact pro-competitive, that any possible anticompetitive effects flowing therefrom would

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term 'commercial banking' . . . composes a distinct line of commerce." [374 U.S. at 356]; *United States* v. *Phillipsburg National Bank & Trust Co.*, 399 U.S. 350, 360-61 (1970).

be outweighed by their probable beneficial effect of meeting the convenience and needs of the community to be served, and that the mergers constitute acquisitions of subsidiary corporations to which Section 7 of the Clayton Act does not apply.

I.

Are the Defendants Violating Section 1 of the Sherman Act?

Section 1 of the Sherman Act proscribes "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States. . . ."

The Government contends that the evidence shows that the five percent defendants engaged in a concerted activity of exchanging detailed information on a formal and continuing basis among themselves and between them and the C&S system. This information is said to relate to past, present and future competitive policies and practices and its exchange is alleged to constitute a combination within the meaning of Section 1 of the Sherman Act.

The defendants do not deny the close operating relationships existing between the five percent defendant banks and the C&S system. The evidence clearly substantiates such relationships and the defendants' defense actually is predicated thereon. The evidence, however, does not similarly support the inference of such relationships between the five percent defendant banks *inter sese*. The defendants contend that C&S

National and C&S Holding either caused, or were essential catalytic agents in, the information of the five percent defendant banks, that management control relationships have continued ever since (since 1965 in the case of Tucker), that such relationships are protected by the "grandfather" provision of the Bank Holding Company Act, that the five percent defendant banks are in effect subsidiaries of C&S, and that, therefore, their formation was excluded from the coverage of the antitrust laws by Section 7 of the Clayton Act, and that, in any event, the question of the violation of Section 1 is committed to the exclusive primary jurisdiction of the Federal Reserve Board.

It is the duty of this Court preliminarily to dispose of challenges to its jurisdiction. As noted above, defendants assert that the Section 1 Sherman Act charges are within the exclusive primary jurisdiction of the FRB. Their position is based primarily on *Whitney National Bank in Jefferson Parish* v. *Bank of New Orleans & Trust Co.*, 379 U.S. 411 (1965), wherein the Supreme Court stated:

> "We believe Congress intended the statutory proceedings before the Board to be the sole means by which questions as to the organization or operation of a new bank by a bank holding company may be tested." [379 U.S. at 419]

Defendants cite an investigation by the FRB in 1967-1968 of the transactions whereby C&S Holding and C&S National acquired stock in and established continuing operating relationships with "C&S Cor-

respondent Associate" banks. (The five percent defendant banks have been C&S Correspondent Associate banks as to which, according to the testimony of C&S's former Chief Executive Officer, there has always been an intention that they would become 100 percent C&S banks as soon as applicable law permitted.) That investigation culminated in an understanding between the FRB and C&S whereby C&S could purchase five percent of the stock in a bank, furnish management assistance, employee benefits, and a president as well as one or two directors and not be deemed to have control of the directors or stock of the bank involved. [Letter from Tynan Smith to Donald I. Baker, March 15, 1972, Gx 177B, quoted at pp. 15-16, *infra.*] Defendants assert that plaintiff participated in the above investigation, but did not institute any action as a result of said understanding despite the requirement of Section 11(b) of the Bank Holding Company Act that:

> "Any action brought under the antitrust laws arising out of an acquisition, merger or consolidation transaction shall be commenced within such thirty-day period." [12 U.S.C. § 1849(b)]

Defendants further claim that action by the Department of Justice is foreclosed by Section 9 of the Bank Holding Company Act [12 U.S.C. § 1848] which provides for a review by the Court of Appeals of orders of the FRB, which review was never sought.

Plaintiff agrees with the proposition that the FRB has primary jurisdiction to consider questions concerning the "organization or operation of a new bank

by a bank holding company" [Plaintiff's brief filed April 10, 1972, pp. 1-2], but claims that that doctrine has no application to the case at hand, stating:

> "Plaintiff therefore concludes that when a question arises concerning only the organization of a new bank by a bank holding company, the answer must be initially found in the Board, subject to review in a Court of Appeals. Logically, this is the 'original exclusive jurisdiction' referred to by the Supreme Court in *Whitney*. That, however, is not the question involved in this case and the very broad language used in *Whitney*, put in its proper context, cannot support the proposition that the BHCA has ousted the district courts of their jurisdiction over antitrust violations when the defendant happens to be a bank holding company." [Plaintiff's brief, supra, pp. 6-7]

With respect to the 1967-1968 "investigation" by the FRB, plaintiff submitted on March 22, 1972, a supplement to its previous brief in opposition to defendants' motion to strike and attached thereto a copy of a letter to Mr. Donald I. Baker, Director of Policy Planning of the Antitrust Division of the Department of Justice, from Mr. Tynan Smith, Secretary of the Board of Governors of the Federal Reserve System dated March 15, 1972. Smith's letter, a response to an earlier letter from Mr. Baker, outlined the position of the Board of Governors as to the 1968 "understanding" and asserted in part:

> "There was no determination made that approval of the Board under section 3 of the Bank

Holding Company Act was required for Citizens & Southern to retain an ownership interest of 5 percent or less in the banking institutions referred to or to maintain the relationships with those banks in circumstances where Citizens & Southern did not elect a majority of the directors of any such bank. There was an understanding reached between members of the Board's staff and representatives of Citizens & Southern that in those cases where Citizens & Southern purchased 5 percent or less of the stock of a bank, in some instances furnishing a principal operating officer for such bank, as well as other employee benefits, Citizens & Southern would not be deemed to have control of a majority of the directors of such bank on these facts alone. Further, where the foregoing circumstances existed and where control of additional shares was purchased by the bank's executive officer, control of such shares purchased would not be attributed to Citizens & Southern so long as Citizens & Southern did not finance the purchase of such shares, directly or indirectly. Finally, it was understood that even though Citizens & Southern was responsible, directly or indirectly, in placing one or two directors on the boards of such banks, if that number did not constitute a majority of directors of such bank, the Board's staff would not consider that Citizens & Southern could reasonably be held to have control of a majority of the directors of such bank.

* * * *

"A representative of the Department of Justice Antitrust Division was invited to attend the

> conference in April 1968 inasmuch as the Department is the agency of the Government having primary responsibility for enforcement of Federal laws with particularized responsibilities relating to possible anticompetitive practices and in view of the fact that any willful violation of any provision of the Bank Holding Company Act may be referred by the Board to the Department of Justice for appropriate investigation and action." [Letter from Tynan Smith to Donald I. Baker, March 15, 1972. Gx 177 B]

According to plaintiff, the issues involved in the FRB investigation to which the above excerpts refer were "(1) had C&S Holding acquired more than five percent of the correspondent associates' stock without prior Board approval and (2) had C&S Holding controlled the election of a majority of the correspondent associates' directors without prior board approval." [Plaintiff's brief filed March 22, 1972, p. 2]

The Government in its post-trial brief (p. 64) takes the position that the exchange of information which forms the basis of its Sherman Act charge amounts to a per se violation of Section 1 of that Act. The Court believes a brief analysis of this position will be helpful in determining the exclusive primary jurisdiction issue.

Generally, only unreasonable restraints of trade violate Section 1 of the Sherman Act. Some practices such as agreements not to compete, collusive price fixing, agreements for market division, group boycotts, tie-in agreements (perhaps), and pooling of

profits and losses, however, have been found to be so intrinsically unreasonable as to constitute what has come to be called per se restraints or violations of the Act. In commenting on the above, Honorable Lee Loevinger, then Assistant Attorney General in charge of the Antitrust Division, noted:

> "It is implicit in this approach to the subject that, whether the legal judgment is based upon intrinsic or extrinsic evidence, it is always intended to be both a pragmatic and a reasonable one. The law proscribes only practices which reasonable men have judged socially incompatible with the maintenance of a free competitive economy. The only difference between the categories of proscribed acts is whether evidence to establish the conclusion that they are unreasonable is inherent in the character of the acts or must be sought in the circumstantial setting. In any case, the rule of reason is implicit in every determination that any conduct is illegal as restraint of trade." [19 A.B.A. Antitrust Section 245, 250]

There is no question that banking is a regulated industry. In its brief of March 17, 1972, the Government notes:

> "Financial institutions, including bank holding companies, are subject to a myriad of statutory regulations administered by a diverse collection of regulatory bodies, including both federal and state agencies. See *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 327-330 (1963). Thus, a single institution may be regulated by

> the Board, the Federal Deposit Insurance Corporation, the Comptroller of the Currency and/or any of several state regulatory agencies depending on its activities. The BHCA is simply one of many statutes which affect the operation of banks." [Plaintiff's brief filed March 17, 1972, p. 3]

Furthermore, the defendants' activities complained of by the Government were all part of the operations of the five percent defendant banks at a time when full branching or ownership was not permitted to C&S, and, in this connection, the Court notes with interest Part D of the Government's jurisdictional statement on appeal to the Supreme Court in *U.S.* v. *Marine Bancorporation, Inc., et al.*, 1973-1 Trade Cases ¶ 74,496, *review granted*, 42 U.S.L.W. 3212 (U.S. Oct. 16, 1973) (No. 73-38), in which the Government stated:

> "D. STATE BANKING LAW AND THE AVAILABLE MEANS OF ENTRY INTO THE SPOKANE MARKET
>
> Washington law permits banks to open branches only in (1) the city in which their headquarters is located; (2) the unincorporated areas of the county in which their headquarters is located; and (3) incorporated communities which have no banking office. Branching into other areas is permitted by the acquisition of an existing bank or banking office. *Banks in the State of Washington have, however, achieved de novo entry into areas foreclosed to de novo branching by sponsoring the organization of an affiliate bank,*

and later acquiring the bank. This method of expansion is a legal (Tr. 732-733) and a well-recognized practice used by large statewide banking organizations (GX I, Tr. 280-298) and recognized by the federal banking authorities (GX H).

"Since NBC's headquarters is in Seattle, it is legally barred from opening a branch in Spokane. In order to enter the city, it would have to make some kind of acquisition. Apart from entry by purchase of a large market share, the method attempted in this case, there were two significant possibilities; acquisition of a sponsored bank formed by its officers, directors or their associates as an independent firm to be assisted by NBC until acquired and converted into a branch; or acquisition of a smaller 'foothold' bank.

"In the last decade, the sponsored bank procedure has become an established method by which national banks enter new markets in Washington. The sponsored bank must first be chartered by the Comptroller as an independent bank. It must be operated for a period of time as a *bona fide* and independent institution, although it may be affiliated with its sponsor for purposes of correspondent relationships and other inter-bank services, including financial support. It may be acquired by its sponsor, with the Comptroller's consent, after it has become established in the banking structure of the community it serves." (Emphasis added)

The Government contends that the following aspects of the relationships between the defendants have restrained interstate trade and commerce:

1. The routine and systematic practice of furnishing to one another comprehensive information as to past, present and future competitive practices and policies with a purpose of achieving uniformity among the defendants;

2. The provision by C&S National to the five percent defendants of various manuals and memoranda;

3. The provision by C&S National to the five percent defendants of suggestions and advice on such matters as rates, hours of operation, types of loan to discourage and minimum loan rates. [Plaintiff's post-trial brief, pp. 57-64]

The Government also asserts, and the record shows, that the advice and suggestions offered by C&S National are generally followed.

These activities, however, do not amount to collusive price fixing. For example, there is no suggestion that any advice as to rates amounts to more than an expert appraisal of a market situation from the point of view of a lending institution—a type of opinion to which a lending institution would naturally be expected to pay great attention. Likewise, the Court does not view the pleadings or evidence as suggesting the existence of any agreements not to compete or for market division. Considering the relatively local nature of the banking area in which each of the five percent defendants operate, there necessarily is a "market division" in a sense established by their very physical location—a matter with which the Court

is not here concerned. While the record will show that there has been some transfer of accounts to one or more of the five percent defendants geographically better located to serve an account, such evidence falls far short of any agreed market division or agreement not to compete. The Court views these apparently isolated instances as analogous to the situation where reservation clerks of one airline inform a potential traveler that another airline offers a more convenient schedule.

The practices involved here do not conform to the accepted definition or description of per se antitrust violations where no resort to context or circumstances is required (or permitted). Thus the following subsidiary questions must be resolved before a violation of Section 1 can be found under the circumstances of this case:

> Is it unreasonable for a five percent defendant bank to implement operating practices similar or identical to those in effect at other C&S banks through the efforts and background knowledge of a principal operating officer furnished by C&S in accordance with the "understanding" with the FRB?
>
> Perhaps the presence of C&S nominees on the Board of Directors contributed to the same end, but is that not what must have been contemplated? What did the representative of the Justice Department's Antitrust Division participating in the conference, out of which the under-

standing arose, assume would be the function of such nominees?

If the FDIC can approve, as it has, 100 percent ownership and operation of the five percent defendant banks as pro-competitive, can it be said that the lesser degree of control now exercised is per se anticompetitive?

The same type of questions can be posed as to each of the factors relied upon by the Government in support of its claims of per se illegality [see Plaintiff's post-trial brief, pp. 57-64] It would be the Court's obligation to determine the reasonableness of each of the challenged practices in the overall context of the banking situation in the area involved unless the doctrine of exclusive primary jurisdiction is applicable to oust this Court's jurisdiction of the Section 1 charges.

Whitney, supra, is authority that such doctrine is applicable not only to questions of organization, but also to questions of operation of banks by bank holding companies. The *Whitney* opinion certainly appears broad enough to cover the factual situation here presented. All of the five percent defendant banks, except Tucker, were new banks when the practices complained of were initially instituted. Certainly, in an industry as minutely, exclusively and as duplicatively regulated as the banking industry, there will be an infinite number of accommodations to the requirements of the different regulations, to the economics of the entire industry, to geographical aberrations, and to similar matters that point to the

need for expert judgment as to whether a certain practice is or is not reasonable. The Department of Justice's acquiescence in 1968 in an understanding involving the more substantial elements of what it now claims to be Section 1 violations is indicative, to at least a small degree, that such practices were not so violently anticompetitive as to constitute per se violations. Inaction by the Department of Justice with such knowledge would have been a violation of its public duty—and the Court does not impute such negligent inaction to it.

In sum, the Court believes, and holds, that the exclusive primary jurisdiction principle set forth in *Whitney* is applicable here even though its implementation may require resort not only to the FRB, but also, perhaps, to other regulatory agencies.

Alternatively, having found that the matters complained of are subject to the "rule of reason," the Court finds that, if it has jurisdiction of this matter (in whole or in part—*i.e.*, C&S Tucker) as the Government contends [Plaintiff's brief filed April 10, 1972], the Government has not sustained its burden of proof as to the unreasonableness of the practices involved or with respect to any adverse impact upon competition. There was no evidence that any customers or potential customers were being adversely affected, and the heads of each competitor organization testified that the operation of the five percent defendant banks as 100 percent C&S banks would not adversely affect them or change the competitive impact on them in any way. There is no evidence

that the quality of service would have been improved absent the factors of which the Government complains. The Government has relied upon a claimed per se illegality rather than unreasonableness of the specific practices involved and, for the reasons set forth above, the Court does not believe the evidence will support a finding that such practices in fact were unreasonable restraints of trade. Indeed, the Court is constrained to find that, balancing the evidence, such practices were in fact reasonable.

Thus, the Government, in setting forth the alternatives available if the Court should issue an injunction, has pointed to the ability of other small banks to secure correspondent services from banks as far away as Birmingham. Evidence of these alternative sources of service indicates that such assistance to, or sponsorship of, a smaller bank, is desirable and necessary and not anticompetitive. The difference between a pure correspondent relationship and a correspondent associate relationship as set forth in the evidence is merely one of degree, a fine line of demarcation almost impossible for the Court to perceive. [Plaintiff's post-trial brief, p. 9] The Government refers to a correspondent relationship as a "mutually beneficial arrangement whereby the smaller bank receives needed services and the larger bank obtains both the benefit of the correspondent bank balance kept with it and the income from the sale of its services to the smaller bank's customers." [Plaintiff's post-trial brief, p. 42] According to the Government, the only difference between the services

provided the five percent defendants banks and the services provided ordinary correspondent banks is that such services are provided to the former "routinely and systematically" [Plaintiff's post-trial brief, p. 42], a difference which the Court finds hard to conceive of providing the basis for Section 1 Sherman Act charges. There is no evidence of record to conclude that the utilization by the five percent defendant banks of the services or information received by them from C&S National or C&S Holding was a result of any tacit or explicit combinations rather than the natural deference of the recipient to information from one with greater expertise or better sources. In either case there is the flow of information as to rates, practices, etc., which the Government apparently applauds or at least condones in a correspondent banking relationship. Taking this into consideration, as well as the Government's previously-quoted statement in *Marine Bancorporation, supra*, the Court finds as a fact that the relationship between C&S National, C&S Holding, and the five percent defendant banks, and the interchange of information between them, have been reasonable under the circumstances and not in violation of Section 1 of the Sherman Act. The Court also finds that the Government has not sustained its burden of proof to the contrary.

Therefore, the Court will dismiss the Government's charges based on Section 1 of the Sherman Act because they are (1) subject to the primary exclusive jurisdiction of the FRB, and (2) not supported by

the evidence. The Court makes its findings on the merits in the interest of judicial economy, having noted the Government's contention that the exclusive primary jurisdiction doctrine is not applicable.

II.

WILL THE PROPOSED MERGERS VIOLATE SECTION 7 OF THE CLAYTON ACT?

Section 7 of the Clayton Act prohibits acquisitions such as are here involved "where in any line of commerce in any section of the country the effect of such acquisition may be substantially to lessen competition. . . ."

As noted above, the appropriate "line of commerce" has been determined to be "commercial banking."

A. *What is the appropriate "section of the country" against which the proposed mergers are to be tested?*

The Government contends that the appropriate "section(s) of the country" are the relevant geographic markets of DeKalb County, North Fulton County, Fulton County and the Atlanta area. [Plaintiff's post-trial brief, p. 6] Defendants contend that the appropriate "section of the country" is the "localized suburban banking market" surrounding each bank sought to be acquired by C&S. [Defendants' post-trial brief, p. 9] The Court need not reach this issue, however, because the Court's disposition

of the case is based upon factors which make a precise delineation of the market area unnecessary. When considering the question of diminution of competition, however, the Court will, for purposes of discussion, look to sections of the country which the Government contends are relevant.

B. *Will any of the proposed acquisitions substantially lessen competition?*

DeKalb County

Treating C&S National, C&S Emory and C&S DeKalb as one banking organization, there are 19 commercial banking organizations operating offices in DeKalb County. In terms of total deposits and total individual, partnership and corporation ("IPC") demand deposits held by all banking offices located in DeKalb County, the top 4 banks, respectively, are C&S (offices of C&S National in DeKalb County, C&S Emory and C&S DeKalb), First National Bank of Atlanta, Trust Company of Georgia, and Fulton National Bank. In terms of outstanding loans, the top 4 banks are C&S (offices of C&S National in DeKalb County, C&S Emory and C&S DeKalb), Trust Company of Georgia, Tucker and Fulton National Bank. The shares of total deposits, total loans and total IPC demand deposits accounted for by the four largest banks are as follows:

Banks	Total Deposits (12/31/71)	Total Loans (12/31/71)	IPC Demand Deposits (6/30/72)
Top 2	38.3%	42.7%	34.8%
Top 3	51.8%	52.4%	47.3%
Top 4	62.9%	61.8%	58.2%

C&S (offices of C&S National in DeKalb County, C&S Emory and C&S DeKalb) accounts for the following shares of total deposits, total loans and total IPC demand deposits held by all banking offices located in DeKalb County.

Bank	Total Deposits (12/31/71)	Total Loans (12/31/71)	IPC Demand Deposits (6/30/72)
C&S	24.1%	28.5%	20.1%

Chamblee, Park National and South DeKalb, all of whose banking offices are located in DeKalb County, account for the following shares of total deposits, total loans and total IPC demand deposits held by all banking offices located in DeKalb County:

Banks	Total Deposits (12/31/71)	Total Loans (12/31/71)	IPC Demand Deposits (6/30/72)
Chamblee	5.7%	5.7%	5.9%
Park National	2.9%	1.5%	3.0%
South DeKalb	1.8%	2.5%	1.9%
	10.4%	9.7%	10.8%

Depending on the unit of measurement, Chamblee is the third or fourth largest bank headquartered in DeKalb County.

If the proposed mergers were approved, the C&S system (which would include offices of C&S National and South DeKalb) would account for 34.5% of the total deposits of all the banking offices located in DeKalb County, 38.2% of the total loans and 30.9% of the total IPC demand deposits. C&S would also be acquiring the third (or fourth) largest bank headquartered in DeKalb County.

If the proposed mergers were approved, the four largest banks would account for the following shares of the DeKalb County market:

Banks	Deposits	Total Loans	IPC Demand Deposits
Top 2 after mergers	48.7%	52.4%	45.6%
Top 3 after mergers	62.2%	62.1%	58.1%
Top 4 after mergers	73.3%	71.5%	69.0%

Thus, if the proposed mergers were approved, the C&S system's share of total deposits, for example, would increase from about 24% to 34%, or an increase of about 40%. The share of total deposits accounted for by the top 4 banks would increase from about 63% to 73%, while that of the top 2 and top 3 banks would increase from 38% to 49% and from 52% to 62%, respectively.

North Fulton County

There are nine commercial banks operating offices in North Fulton County. In terms of total deposits and total IPC demand deposits held by all banking offices located in North Fulton County, the top 4 banks, respectively, are Sandy Springs, Roswell Bank, Fulton Exchange Bank and North Fulton. On June 30, 1970, however, there were only five banks operating offices in North Fulton County: the four banks just mentioned and Trust Company of Georgia Bank of Sandy Springs, which is now a branch of Trust Company of Georgia. The shares of total deposits and IPC demand deposits accounted for by the four largest banks are as follows:

Banks	IPC Demand Deposits (6/30/72)	IPC Demand Deposits (6/30/70)	Total Deposits (6/30/70)
Top 2	57.8%	66.4%	64.0%
Top 3	70.1%	78.9%	80.2%
Top 4	80.3%	90.7%	91.9%

As of June 30, 1972, the North Springs Office of C&S East Point accounted for 1.7% of total IPC demand deposits held by all banking offices located in North Fulton County.

As of June 30, 1972, Sandy Springs and North Fulton accounted for 36.4% and 10.2%, respectively, of total IPC demand deposits held by all banking offices located in North Fulton County. As of June 30, 1970, they accounted for 34.4% and 11.7%, re-

spectively, of total deposits held by all commercial banking offices located in North Fulton County.

If the proposed mergers were approved, the C&S system (which would include C&S East Point's North Springs Office, North Fulton and Sandy Springs) would account for 48.3% of the total IPC demand deposits held by all commercial banking offices located in North Fulton County and the four largest banks would account for the following shares of IPC demand deposits in North Fulton County:

Banks	IPC Demand Deposits
Top 2 after mergers	69.7%
Top 3 after mergers	82.0%
Top 4 after mergers	92.0%

Thus, if the proposed mergers were approved, the C&S system's [2] share of total IPC demand deposits held by all banking offices located in North Fulton County would increase from 1.7% to 48.3%, and the C&S system's share in this area would be twice that of the second largest banking organization, the

[2] These computations consider the five percent defendant banks as completely separate entities (rather than as constituting a part of the C&S system as actually is the case), and of course, do not relate to competition as such but rather to the assignment of statistical proportions to the various entities involved.

Roswell Bank. Two of the four largest banks in the area would become part of the Atlanta area's largest banking organization. In addition, the share of total IPC demand deposits accounted for by the top 4 banks would increase from 80.3% to 92.0%, while the shares of the top 2 and top 3 banks would increase from 57.8% to 69.7% and from 70.1% to 82.0%, respectively.

Fulton County

Treating C&S National and C&S East Point as one banking organization, there are 18 commercial banking organizations operating offices in Fulton County. In terms of total loans, deposits and IPC demand deposits held by all banking offices located in Fulton County, the top 4 banks, respectively, are C&S (offices of C&S National in Fulton County and C&S East Point), First National Bank of Atlanta, Trust Company of Georgia and Fulton National Bank. The shares of total loans, deposits and IPC demand deposits accounted for by the four largest banks are as follows: [3]

Banks	Total Loans (12/31/71)	Total Deposits (12/31/71)	IPC Demand Deposits (6/30/72)
Top 2	63.0%	55.2%	61.3%
Top 3	78.8%	73.9%	78.1%
Top 4	89.4%	87.0%	88.8%

[3] See footnote 2, *supra*.

C&S (offices of C&S National in Fulton County and C&S East Point) accounts for the following shares of total loans, deposits and IPC demand deposits held by all banking offices located in Fulton County:

Bank	Total Loans (12/31/71)	Total Deposits (12/31/71)	IPC Demand Deposits (6/30/72)
C&S	37.2%	30.8%	32.1%

Sandy Springs and North Fulton, both of whose banking offices are located in Fulton County, account for the following shares of total loans, deposits and IPC demand deposits held by all banking offices located in Fulton County:

Banks	Total Loans (12/31/71)	Total Deposits (12/31/71)	IPC Demand Deposits (6/30/72)
Sandy Springs	.7%	.8%	.9%
North Fulton	.3%	.3%	.3%
	1.0%	1.1%	1.2%

Depending on the unit of measurement, Sandy Springs is the eighth or ninth largest banking organization in Fulton County.

If the proposed mergers were approved, the C&S system (which would include offices of C&S National in Fulton County, C&S East Point, Sandy Springs and North Fulton) would account for 38.2% of the total loans held by all banking offices in Fulton

County, 31.9% of the total deposits and 33.3% of the total IPC demand deposits.

If the proposed mergers were approved, the four largest banks would account for the following shares in Fulton County:

Banks	Total Loans	Total Deposits	IPC Demand Deposits
Top 2 after mergers	64.0%	56.3%	62.5%
Top 3 after mergers	79.8%	75.0%	79.3%
Top 4 after mergers	90.4%	88.1%	90.0%

Atlanta Area

Treating C&S National, C&S Emory, C&S DeKalb and C&S East Point as one banking organization, there are 31 commercial banking organizations operating offices in the Atlanta area, six of which operate offices in both Fulton and DeKalb Counties. In terms of total loans, deposits, and IPC demand deposits held by all banking offices located in the Atlanta area, the top 4 banks, respectively, are C&S (offices of C&S National, C&S East Point, C&S Emory and C&S DeKalb), First National Bank of Atlanta, Trust Company of Georgia and Fulton National Bank. The shares of total loans, deposits and IPC demand deposits accounted for by the four largest banks are as follows:

Banks	Total Loans (12/31/71)	Total Deposits (12/31/71)	IPC Demand Deposits (6/30/72)
Top 2	60.5%	53.2%	58.0%
Top 3	76.2%	71.3%	74.3%
Top 4	86.7%	84.2%	85.0%

C&S (offices of C&S National, C&S Emory, C&S East Point and C&S DeKalb) accounts for the following shares of total loans, deposits and IPC demand deposits held by all banking offices located in the Atlanta area:

Bank	Total Loans (12/31/71)	Total Deposits (12/31/71)	IPC Demand Deposits (6/30/72)
C&S	36.4%	30.0%	30.6%

Chamblee, Park National, South DeKalb, Sandy Springs and North Fulton account for the following shares of total loans deposits and IPC demand deposits held by all banking offices located in the Atlanta area:

Banks	Total Loans (12/31/71)	Total Deposits (12/31/71)	IPC Demand Deposits (6/30/72)
Chamblee	.5%	.6%	.8%
Park National	.1%	.3%	.4%
South DeKalb	.2%	.2%	.3%
Sandy Springs	.6%	.7%	.8%
North Fulton	.3%	.2%	.2%
	1.7%	2.0%	2.5%

If their deposits (as of 12/31/71) were combined ($71,142,252), these five banks would be the equivalent of the sixth largest banking organization in the Atlanta area. Sandy Springs and Chamblee are, alone, the tenth and eleventh largest banking organizations in the Atlanta area, respectively.

If the proposed mergers were approved, the C&S system (which would include the offices of C&S National in the Atlanta area, C&S Emory, C&S DeKalb, C&S East Point, Chamblee, Park National, South DeKalb, Sandy Springs and North Fulton) would account for 38.2% of the total loans held by all banking offices located in the Atlanta area, 32.0% of the total deposits and 33.0% of the total IPC demand deposits. C&S would also be acquiring the tenth and eleventh largest banks in the Atlanta area.

If the proposed mergers were approved, the four largest banks would account for the following shares in the Atlanta area:

Banks	Total Loans	Total Deposits	IPC Demand Deposits
Top 2 after mergers	62.2%	55.2%	60.5%
Top 3 after mergers	77.9%	73.3%	76.8%
Top 4 after mergers	88.4%	86.2%	87.5%

From June 30, 1970, to June 30, 1972, 56 branch banking offices were opened throughout Fulton and

DeKalb Counties. The major Atlanta banks, C&S, First National Bank of Atlanta, National Bank of Georgia, Trust Company of Georgia and Fulton National Bank accounted for 42 of these offices (18 in Fulton County and 24 in DeKalb County). The remaining offices were established by banks headquartered in the suburban portions of the Atlanta area. Thus the 1971 amendments to the Georgia branch banking laws have already resulted in the opening of 29 offices in the suburban portions of the Atlanta area by the large Atlanta banks.

Since January 1, 1970, C&S has submitted 12 applications for approval of banking offices in the Atlanta area to the Comptroller of the Currency. Of this number, four applications were denied, six were approved but have not yet been opened, and two are still pending. The two pending applications and three of the six approved applications are for locations in the suburban portions of the Atlanta area. Since January 1, 1971, C&S, Emory, DeKalb and East Point have opened a total of eight banking offices in the Atlanta area, five in its suburban portions.

Since January 1, 1971, the following suburban Atlanta banks have established new offices in the Atlanta area: Bank of the South, Citizens Bank of Georgia, DeKalb County Bank, DeKalb Exchange Bank, Fulton Exchange Bank, First Palmetto Bank, Peachtree Bank and Trust Company, Peoples Bank and Roswell Bank. South DeKalb has opened an additional office; North Fulton has filed an applica-

tion for an additional branch which is still pending, and Sandy Springs was contemplating branching before the proposed mergers were agreed upon.

The Atlanta area is growing rapidly. Much of this growth is occurring in DeKalb County and North Fulton County and is expected to continue.

C. *The Nature of the Relationships Between the Defendants*

Defendants argue that, as a result of the past and present relationships between the defendants, the banks involved in the mergers here under consideration do not compete today, have never competed in the past, and that there is no reasonable probability that they will ever compete. [Defendants' post-trial brief, p. 17] The Court will examine the factual basis of that argument.

C&S and C&S Holding were intimately involved in all aspects of the organization of the five percent defendant banks which are the subject of these proposed mergers. The influence of C&S and C&S Holding was significant.

Mr. Mills Lane, who was then president of C&S, and other officers of C&S played a major role in the selection of directors for each of the five percent defendant banks. The directors of each five percent defendant bank were assured of C&S support and have relied upon it. Furthermore, C&S and its officers helped distribute the stock for each five percent defendant bank.

There are a large number of shareholders in each C&S five percent defendant bank, and no single shareholder owns a significant number of the shares of any such bank. C&S Holding, of course, directly owns five percent of the stock of each five percent defendant bank and substantial additional amounts of the stock of each such bank are owned by C&S officers and employees and officers and employees of other C&S banks and their business associates.

Approximately 50 percent of the stockholders of Park National are directors, officers or employees of C&S, Park National, or some other C&S-affiliated bank. An additional 38 percent of the stockholders of Park National are customers of C&S or one of its affiliated banks.

Approximately 44 percent of the stockholders of North Fulton are officers, directors, or employees of C&S or some C&S-affiliated bank or correspondent associate bank. An additional 50 percent of the stockholders of North Fulton are customers of C&S or one of its affiliates.

Approximately 46 percent of the stockholders of South DeKalb are officers, directors or employees of C&S or one of its affiliates. An additional 18 percent of such stockholders are officers, directors or employees of a C&S correspondent associate bank. In total, approximately 66 percent of South DeKalb's stockholders are present or former officers, directors or employees of a C&S bank.

Approximately 24 percent of the stockholders of Sandy Springs are present or former officers, direc-

tors or employees of C&S or one of its affiliate banks. An additional 28 percent of the stockholders of Sandy Springs are officers, directors or employees of a C&S correspondent associate bank. In addition, 48 percent of the stockholders of Sandy Springs are C&S customers.

Approximately 12 percent of Chamblee's stockholders are officers, directors or employees of C&S or one of its affiliate banks. An additional 16 percent are officers, directors and employees of a C&S correspondent associate bank. About 29 percent of Chamblee's stockholders are customers of C&S or one of its affiliate banks, and 41 percent are customers of a C&S correspondent associate bank.

The percentage of stock in each correspondent associate defendant bank held by the above categories of persons has not varied greatly from the time of organization until the time of trial; and there is no claim of violation of the 1968 "understanding" with the FRB.

As noted above, however, subsequent to the trial herein, the Georgia Supreme Court issued its decision in *Independent Bankers Assn. of Georgia, Inc.* v. *Dunn, et al., supra*, in which it held that the ownership of shareholders, officers and directors of the bank holding company must be attributed to it in complying with the five percent ownership limitation imposed by Georgia law.

According to an uncontroverted supplemental affidavit of Mr. Joseph A. Hall, III, dated August 1, 1973, the percentage of stock in each of the defend-

ant correspondent associate banks owned by C&S Holding and the officers and directors of C&S, C&S Holding, and C&S affilate banks and their wives, as of the time of the affidavit was as follows:

Sandy Springs	11.75%
Chamblee	6.41%
North Fulton	13.26%
Park National	10.33%
South DeKalb	36.87%

It would appear that the Georgia Supreme Court's decision in *Independent Bankers Assn. of Georgia, Inc.* v. *Dunn, et al., supra*, will affect the following percentages of stock (the above percentages less 5 percent) in the five percent defendant banks:

Sandy Springs	6.72%
Chamblee	1.41%
North Fulton	8.26%
Park National	5.33%
South DeKalb	31.87%

In view of the fact that the decisions of the Supreme Court of Georgia in *Independent Bankers* were issued following the trial in this Court, the Court is left to speculate in large part as to the effect of the Georgia Supreme Court's opinion on the relations *inter sese* of the defendants herein insofar as they are predicated on stock ownership or control.

A survey taken in May 1971 showed that the overwhelming majority of the shareholders in each five percent defendant bank expressly anticipated that C&S would provide management for their bank and

that their bank would be merged into C&S or one of its affiliate banks if and when Georgia's branch banking laws were changed to permit such mergers. Many of the directors of the five percent defendant banks assumed that such mergers would eventually be possible because the branch banking laws would be amended or the city limits of Atlanta would be expanded so as to bring into the city some of the areas where such banks are located. Similarly, the executive officers of C&S anticipated that C&S or one or more of its affiliates would merge with the five percent defendant banks as soon as possible.

C&S has made one of its own officers available to be hired as president for each five percent defendant bank and, in each case, the person supplied by C&S has had prior training and experience within the C&S system. With few exceptions each of the officers and employees for each five percent defendant bank had been previously employed or trained by C&S.

With respect to each of the five percent defendant banks, the bank regulators (state and federal) knew that such defendant would be affiliated with a large bank, presumably the C&S system, and such knowledge was instrumental in their decisions to approve the charters of those banks. The affidavit of Mr. William B. Camp, Comptroller of the Currency, states:

> "Each of the three defendant banks mentioned above—C&S Sandy Springs, C&S Chamblee, and C&S Park National—were originally chartered as national banks. The charter was issued by

the Office of the Comptroller of the Currency after a careful examination of, among other things, the identity of those persons applying for the charter; their business and banking experience and associations; the proposed management for the banks; the likelihood of financial success of the proposed banks; and the proposed bank's ability to serve the convenience and needs of the community in which it was to be located. In each instance, the Comptroller of the Currency in considering the application was aware of, and took account of, the fact that the proposed new bank, its directors and management would be closely associated with The Citizens and Southern National Bank ("C&S National"). This fact represented a substantial favorable element in considering each of the applications. The participation of C&S National with the new bank and the availability of C&S National management to act as executive officers of the new bank was deemed to be significant and to some extent controlling in establishing that the bank would be financially successful and could serve all of the banking needs of the potential customers. The relationships between C&S and these banks, and the contributions by C&S in the form of advice and service relationships, was instrumental in the decision for approval of the original charters for these banks by the Office of the Comptroller of the Currency.

Mr. Camp's affidavit went further:

"While C&S Sandy Springs and C&S Chamblee operated under a national bank charter (1959-1969 and 1960-1969, respectively) and

during C&S Park National's entire history, the Office of the Comptroller of the Currency had occasion regularly to consider the relationship between these banks and C&S National. Among other such occasions were the periodic examinations of the banks by national bank examiners. The Office of the Comptroller of the Currency was thus fully aware of the existence of the relationships between these banks and C&S National, including the various operating relationships more fully spelled out in the applications submitted on behalf of The Citizens and Southern Bank of East Point and The Citizens and Southern Emory Bank to the Federal Deposit Insurance Corporation respecting the proposed mergers of those banks with certain of the defendants named above. The Comptroller of the Currency considered then that existence of such relationships were in accordance with all applicable laws, and at no time objected to the existence of such relationships. While the Comptroller of the Currency at all times required of these banks, their management and their directors that all necessary operational and fiduciary responsibilities required by law in connection with the existence of these banks as separately chartered banks be adhered to, the Comptroller of the Currency understood that one of the purposes for establishing these banks was to make available to the management of these banks C&S expertise in certain portions of the Atlanta metropolitan area where C&S, by reason of Georgia branch banking laws, could not establish its own operations." [Defendants' Exhibit 152]

State Superintendent of Banks, Mr. W. M. Jackson, whose office approved the charters for North Fulton and South DeKalb, testified that his office was aware of, and found favorable to approval, the fact that C&S would provide the management for those banks and that they would be closely affiliated with the C&S system.

C&S selected, or helped select, the physical location of each five percent defendant bank. In some instances, C&S Holding purchased and held the land for the new five percent defendant bank, and sometimes this was done before the directors of such bank were even selected. C&S's market research department prepared the application for charters and made the required economic survey for each five percent defendant bank.

C&S obtained the necessary insurance coverage for each new five percent defendant bank; it assisted in selecting and procuring equipment and forms for each new bank; it supervised the promotional activities at the time each new bank was organized; and it is safe to say that, from the very beginning, the relationship between C&S and each five percent defendant bank has been much closer than the normal correspondent banking relationship. These factors have an important bearing on the nature, quality and quantity of competition, if any, between the five percent defendant banks and C&S National because, concededly, large banks do not usually furnish presidents or other managing officers from their own staffs to new banks, and large banks are not usually or nor-

mally involved in the distribution of stock for new banks or in the selection of their directors.

There are additional factors relevant to this issue. Park National has used the C&S name and logo at all times since it was organized, as have North Fulton and South DeKalb. Sandy Springs adopted the C&S name and logo in 1966 so that it would become more closely identified with the C&S system. Currently there are no visible differences between C&S's branches and the five percent defendant banks in that all of them use the C&S logo and have "Citizens and Southern" in their names. In fact, there is a conscious effort made by all parties to insure that the five percent defendant banks are identified publicly as C&S banks.

A few specific examples are illustrative.

A few years ago, Sandy Springs developed serious liquidity problems because of heavy loan losses. C&S recommended that its then president, Mr. Cook,[4] be replaced and Mr. Cook subsequently resigned. Mr. Louis J. Fortuna, who had spent 16 years as an employee and officer of C&S, was then elected the new president of Sandy Springs. When Mr. Cook resigned, the directors of Sandy Springs assumed that the new president would be someone who had been previously employed by C&S, and, despite the serious problem resulting during the tenure of the

[4] Mr. Thomas E. Cook was the first president of Sandy Springs. Prior to becoming such, he had been employed by C&S National for 12 years and had never worked for another bank.

former president who also had been supplied by C&S, they never considered terminating the relationship between Sandy Springs and C&S or looking elsewhere for a president.

Likewise, when Mr. Harris retired as president of Chamblee, he was replaced by Mr. Bobby G. Morris, who previously had been employed by C&S.

The same emergency personnel "pool" that is available to C&S's branches is available to, and used by, the five percent defendant banks when vacancies are caused by sickness, vacations, resignations, or other emergencies. (The five percent defendant banks, however, must pay for each person utilized from this emergency personnel pool.)

The management and staff of all C&S banks, including the five percent defendant banks, are covered by the same employment, salary administration, and fringe benefit programs. It should be noted, however, that the five percent defendant banks are responsible for their own employment programs, administer their own salary programs and have adopted fringe benefit programs which, while similar to those of C&S, are funded by the individual banks. Officers and employees of the five percent defendant banks participate in pension and profit sharing plans which, while funded by the individual banks, are administered by C&S. If an individual is transferred from C&S to a five percent bank, his length of service at C&S is recognized for purposes of the pension and profit sharing plans. Two presidents of five percent defendant banks acknowledged that their benefits and

opportunities for advancement relate to their service within the C&S system, rather than with an individual five percent bank, and that they identify their future and associate their careers with the C&S system.

The accounting policies of the five percent defendant banks are the same as those of C&S and its branches and affiliates, and the actual accounting work is done by the same people at the same place.

The credit administration and controls for the five percent defendant banks are the same as those for C&S and its branches. The officers of each five percent defendant bank attend regular credit meetings with officers of C&S and its affiliates. Certain loans made by the five percent defendant banks are reviewed (at the weekly credit meeting) for credit worthiness by C&S.

The routine credit audits performed by C&S on the five percent defendant banks are vitally important to the continued safety and stability of these banks. Small independent banks frequently develop serious problems because they lack such service and supervision. (However, it should be noted, of course, that C&S National is not the only possible source of such service and supervision.)

The officers and employees of the five percent defendant banks receive and use all of the guides and manuals distributed to and used by C&S banks and branches, including the C&S General Operating Guide, the C&S Installment Loan Audit Manual, the Personnel Policy Manual, the Commercial Loan Audit

Manual and the C&S Consumer Credit Operating Guide. Also available to the five percent defendant banks are C&S's helicopter and ground transportation services; any new sales tool, product, or service developed by C&S is automatically provided to the five percent defendants.

An executive officer from C&S generally meets with the Board of Directors of each five percent defendant bank. He is referred to as the "advisory director" and his purpose is to provide needed information about C&S banking to the directors of the five percent defendant bank, and those directors depend on him for such advice.

C&S assists the five percent defendant banks when they have capital problems. When Sandy Springs developed the liquidity problem referred to above, that bank's capital was increased by the purchase by C&S from Sandy Springs of a $100,000 capital note. C&S again provided needed capital to Sandy Springs in 1968 when it purchased a $125,000 convertible debenture. C&S provided additional capital for Chamblee by purchasing a $300,000 convertible debenture in 1968. It likewise purchased a $200,000 capital note from North Fulton.

The five percent defendant banks have been supervised by C&S's branch supervision department since that department was organized in the early 1960's. Through its branch supervision department, C&S regularly reviews the goals, objectives and performance of each five percent defendant bank, following the same procedures that it follows with its branches.

Thus it reviews the comparative performance of all banking offices, of the five percent defendants, as well as all others in the C&S system.

All banking services provided by C&S are made available to the customers of the five percent defendant banks. The customers of the five percent defendant banks can handle their banking transactions, such as cashing checks and making deposits, at all the offices of C&S National and its affiliates as well as at the offices of other C&S correspondent associate banks. Similarly, customers of C&S can handle their banking transactions at the offices of the five percent defendant banks. This multiple use of C&S banking facilities is made possible by the joint public identification of the facilities and their identical internal procedures.[5] Many persons who are customers of either a C&S system bank or a five percent defendant bank make use of the other's banking facilities, at least on occasion. Some of the check cashing and deposit transactions of the five percent defendant banks involve C&S customers who have their accounts at other C&S banks.

Mr. W. M. Jackson, identified above, testified that he routinely contacted executive officers of C&S National whenever bank examinations revealed the need for adjustments in the C&S five percent banks. Mr. Jackson testified that he felt he achieved better results by approaching C&S Holding than by approaching the presidents of the correspondent associate

[5] Defendants estimate more than three-fourths of their customers make such multiple use of their facilities.

banks, and the Court notes that the adjustments were always made by C&S Holding. He testified also that he realized that the five percent bank would have the same policies, arrangements and support as other C&S banks. Both Mr. Jackson, and Mr. Dunn, the new superintendent of banks, testified that the public views the five percent defendant banks as C&S banks, and that testimony is well supported in the record, which includes similar testimony from officials of other banks in the Atlanta Metropolitan Area.

Despite the differences in the percentage of stock of the five percent defendant banks owned by C&S Holding and the officers and directors of C&S, C&S Holding, and C&S affiliate banks and their wives [see p. 36], it is clear to the Court that all of the defendant banks have the same strong affiliation with the C&S system, and the Court is unable to perceive any difference in degree thereof. This factor, among others, leads the Court to conclude that stock ownership is not the most important cement, nor is even necessary to the maintenance of these strong relationships which appear to be due to other more intangible matters described above.

While the persuasive weight of the testimony does not always, or necessarily even usually, coincide with the greater number of witnesses who testify on any subject, it is nevertheless a matter of interest and relevance that no witness (for either the Government or the defendants) testified that the proposed mergers would have any adverse economic or competitive implications whatever (the Government's expert wit-

ness did not testify on this point, but merely on what are the relevant sections of the country so far as this litigation is concerned). When questioned as to whether the five percent defendant banks are regarded as part of the C&S system or as independent entities, every banker who testified (including officials of banks which compete with the five percent defendant banks) expressed the view that the proposed mergers would have no effect whatsoever on competition as it relates to third parties.[6] The Court concurs.

D. *Conclusions of Law as to Section 7 Issues*

Section 7 of the Clayton Act [15 U.S.C. § 18] provides in part:

> "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

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[6] As the Supreme Court made clear in *Brown Shoe Co.* v. *U. S.*, 370 U.S. 294 (1961), Congress, in redrafting § 7, was specifically concerned with the "protection of *competition*, not *competitors*." [370 U.S. at 320] Thus the fact that such competition is provided, if it is, by a branch of C&S National, rather than by an independent corporation is immaterial.

The Bank Merger Act of 1966 [12 U.S.C. § 1828 (c)] provides in part:

"(5) The responsible agency shall not approve—
(A) any proposed merger transaction which would result in a monopoly, or which would be in furtherance of any combination or conspiracy to monopolize or to attempt to monopolize the business of banking in any part of the United States, or

(B) any other proposed merger transaction whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.

* * * *

"(7) (A) Any action brought under the antitrust laws arising out of a merger transaction shall be commenced prior to the earliest time under paragraph (6) at which a merger transaction approved under paragraph (5) might be consummated. The commencement of such an action shall stay the effectiveness of the agency's approval unless the court shall otherwise specifically order. In any such action, the court shall review de novo the issues presented.

> (B) In any judicial proceeding attacking a merger transaction approved under paragraph (5) on the ground that the merger transaction alone and of itself constituted a violation of any antitrust laws other than section 2 of Title 15, the standards applied by the court shall be identical with those that the banking agencies are directed to apply under paragraph (5)."

Bank mergers are subject to the competitive standards of Section 7 of the Clayton Act. *U.S.* v. *First City National Bank of Houston*, 386 U.S. 361 (1967). In a bank merger case, this Court must make a *de novo* review of the transaction to determine whether it has anticompetitive effects and, if so, whether the merger's benefits to the community outweigh its anticompetitive disadvantages. *U.S.* v. *Third National Bank in Nashville*, 390 U.S. 171 (1968). The burden of proving the reasonable probability of a substantial lessening of competition is upon the Government as plaintiff, *U.S.* v. *Philadelphia National Bank*, 374 U.S. 321, 363 (1963). The defending banks have the burden as to the "convenience and needs" defense allowed under the Bank Merger Act. *U.S.* v. *First City National Bank of Houston, supra*, 386 U.S. at 366; *U.S.* v. *Connecticut National Bank*, 362 F. Supp. 240, 279 (D. Conn. 1973).

With respect to the degree of proof required to make out a Section 7 case, the Supreme Court stated in *Brown Shoe*:

> ". . . Congress used the words '*may be* substantially to lessen competition' (emphasis supplied), to indicate that its concern was with probabilities, not certainties. Statutes existed for dealing with clear-cut menaces to competition; no statute was sought for dealing with ephemeral possibilities. Mergers with a probable anticompetitive effect were to be proscribed by this Act. . . ." [370 U.S. at 323]

See also *U.S.* v. *E. I. duPont deNemours & Co.*, 353 U.S. 586, 607 (1957); *U.S.* v. *I.T. & T. Corp.*, 324 F. Supp. 19, 30-31 (D. Conn. 1970); *U.S.* v. *Connecticut Nat'l Bank*, 362 F. Supp. 240 (D. Conn. 1973).

It being conceded that "commercial banking" is the appropriate "line of commerce", and the Court having adopted (for purposes of discussion) the Government's delineation of the relevant "section of the country" to be considered, the determinative issue is whether the effect of the proposed mergers "may be substantially to lessen competition." As noted previously, it is the mergers' effect upon competition that is important—not the corporate identity of the participants or competitors. The Court has found that there would be no diminution of competition between the five percent defendants *inter sese*, whether they are considered as separate corporate entities or as branch components of the C&S system, or between such five percent defendants and third parties, if the acquisitions sought were approved. The other side of the coin, of course, is the effect of the acquisitions upon competition between the five percent defendants and the C&S system of banks.

In this connection, an important judicial precedent to be considered is the opinion of the United States District Court for the Western District of Texas, El Paso Division, in *U.S.* v. *Trans Texas Bancorporation, Inc.*, —— F. Supp. —— (W.D. Tex. 1972); 1972 Trade Cases ¶ 74,257; Civil No. EP-72-CA-83 (W.D. Tex., filed Nov. 13, 1972); *affirmed*, 412 U.S. 946 (1973), which is almost squarely in point.

In *Trans Texas*, the district court did not find the mergers or acquisitions to be anticompetitive and therefore refused to enjoin them. It is also noteworthy that the mergers in *Trans Texas* had received, as have the proposed mergers here, the approval of the appropriate federal banking regulators. The background of that litigation is set out in the report of the Board of Governors of the Federal Reserve System approving the Texas applications, which was quoted and considered by the District Court:

> "Majority shareholders of El Paso Bank organized First Bank in 1948, Northgate Bank in 1959 and Border Bank in 1971. El Paso Bank is a full service bank serving the entire El Paso area, whereas the other three serve primarily their own particular suburban area. All four banks are in the same market area and absent the common ownership would be competitors to some extent despite the disparities in their size.
>
> "The United States Department of Justice advised the Board that in its opinion consummation of the proposal would have a significantly adverse effect on competition. Its advice was based

on its views that the subject banks were in actual competition and that there was some degree of impermanence in the control relationship.

"On the basis of the record, the Board concludes that there is no significant existing competition between the banks involved. This is due to the fact that two individuals and their business associates control a majority of the voting shares of El Paso Bank, 86% of the shares of the First Bank, 86% of the shares of Northgate Bank, and 75% of the shares of Border Bank. The two individuals themselves control over 25% of the voting shares of each of the three smaller banks.

"In view of the close relationship between the banks over a long period of time, and the lack of any evidence on the record that dissipation of the common control is likely in the future, the Board concludes that present and potential competition would neither be foreclosed by approval of the application nor encouraged by its denial. Neither does it appear that competition with and between other banks in the area would be affected in any significant way.

"Considerations relating to the financial and managerial resources and future prospects of Applicant and the banks concerned are satisfactory and consistent with approval. Since the institutions involved are presently under common control it is unlikely that consummation of the proposal will have a significant effect on the banking convenience and needs of the communities to be served, although Applicant does propose to expand the services offered by the smaller

banks. These considerations are consistent with but provide little weight toward approval of the applications. It is the Board's judgment that consummation of the proposed transaction would be in the public interest, and that the application should be approved.

"On the basis of the record, the application is approved for the reasons summarized above." [—— F. Supp. at ——, 1972 Trade Cases ¶ 74,257 at p. 93,208]

The defendants in *Trans Texas* contended, as do defendants herein, that the proposed acquisitions were without effective competitive significance as the three banks to be acquired were "common ownership" affiliates of El Paso and that the effect of the acquisition would be merely to change the form of banking organization from its present structure to that of a group banking organization. In *Trans Texas* the Department of Justice took a position similar to that espoused in this case and contended that the banks involved were in actual competition with each other and that there was a degree of impermanency in the control relationship. In *Trans Texas* some of the problem also stemmed from the anti-branching statutes of the State of Texas. After considering the legalities of the existing control relationships (which will be considered below in the instant case) and in the absence of evidence that the common control would be likely to be dissipated in the future, the *Trans Texas* court held that there was no significant existing competition between the banks involved and therefore that the proposed transaction, if con-

summated, would have no significant adverse competitive effect on the banking community. Accordingly, the *Trans Texas* court denied injunctive relief.

The *Trans Texas* court recognized that the principal issue to be decided was the question of control, and stated that "If control does exist the Court is of the opinion that the three neighborhood banks lacked competitive capabilities and there was no actual competition among them." [—— F. Supp. at ——, 1972 Trade Cases ¶ 74,257 at p. 93,213]

The Supreme Court's summary affirmance of the district court's decision in *Trans Texas* is a decision on the merits and must be followed by this Court. Although the Supreme Court has noted that, "As frequently occurs in the case of summary affirmance, the decision . . . is somewhat opaque," [7] it seems to this Court that with respect to the *Trans Texas* case, the Supreme Court had to determine that the district court's finding of lack of competition between merging entities was sufficient to preclude application of the Clayton Act despite the fact that in *Trans Texas*, as in this case, the banks were separate entities and the lack of competition resulted from a control situation—in *Trans Texas* a third party legal stock control situation—here, a similar situation but one based on numerous implementing relationships in addition to stock ownership.

Fundamental to the decision of the District Court in *Trans Texas* was the underlying finding of the FRB that ". . . there is no significant existing com-

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[7] *Gibson* v. *Berryhill*, 411 U.S. 564, 576 (1973).

petition between the banks involved." The reason for that lack of competition was explained in the Board's findings as ". . . due to the fact that two individuals and their business associates control a majority of the voting shares . . ." of those banks. The FRB also found, as pointed out specifically by the District Court, that "All four banks are in the same market area and absent the common ownership would be competitors to some extent despite the disparities in their size." The District Court also determined that, by reason of their common control by two individuals and their business associates, there was no actual existing competition between the banks involved.

The evidence as to the existing competition between the five percent defendant banks and C&S National and other banks in the C&S system is marshaled at pp. 22-35 of the Government's post-trial brief. There is, of course, some such competition. It was variously denominated as "friendly" or "minor" competition. It might well be denominated "rivalry" rather than "competition." But, considering the geographic dispersal or separation which exists between the five percent defendant banks, as well as between those banks and other constituents of the C&S system of banks, this is to be expected.

The Government admits that it did not challenge the initial acquisition by C&S Holding of its five percent interest in each of the five percent defendant banks because those acquisitions "were competitively insignificant when made." [Plaintiff's post-trial brief,

p. 14] The Government has not carried its burden of demonstrating any substantial increase in the degree of control or change in quantity of competition between the date of the initial acquisitions and the date of the trial. The Government has postulated that if the mergers are denied, C&S may establish *de novo* branches in direct competition with the five percent defendants. To find a viable competitive result from such a postulate, the Court would have to speculate that (1) the five percent defendant banks actually would break away from C&S, (2) they would become successful independent banks despite their past reliance on C&S, and (3) the regulatory agencies would approve directly competitive branching by C&S. The evidence of record does not support, individually or collectively, such postulates or speculations. Furthermore, it seems to the Court that the relevant issue is not what the banks would do if the mergers were denied by this Court, but rather what they would do in the absence of any ruling by the Court, or perhaps in the absence of litigation, although the dividing line between these two statements of the appropriate issue is quite fine. In any event, it is the Court's finding that the relationship as among the defendants is principally a matter of such intangible factors as the intentions of the principals, and that stock ownership is merely one manifestation along with various implementing operating procedures. Thus stock divestiture, if required, would not necessarily or probably eliminate the relationships which negative competition among the defendants, and the evidence of record would

not permit a finding that even complete divestiture would result in any substantial increase in competition among them.

Thus, the Court finds as a fact that there is no presently existing substantial competition between the five percent defendant banks and C&S National, or *inter sese*, or with third parties, which would be affected by the proposed merger. So far as the issues in this antitrust case are concerned, the Court is of the opinion that it makes no difference whether this absence of competition results from a legally effective stock ownership control, as in *Trans Texas*, or from the more intangible factors present here. It is the absence of competition which is the crucial factor in a Section 7 case, not the underlying factors producing that situation.

Amicus curiae, Independent Bankers Association of Georgia, Inc., urges the Court to find for the Government on the ground "that if this Court permits these five banks to be merged into the Citizens & Southern Emory Bank and the Citizens & Southern Bank of East Point, it will forever preclude the Georgia Commissioner of Banking and Finance from carrying out the judgment of the Supreme Court of Georgia" in *Independent Bankers Association of Georgia* v. *Dunn*, —— Ga. —— (1973), Opinion on Reconsideration and Rehearing, decided November 15, 1973. The jurisdiction and function of this Court, however, relates to the enforcement of the antitrust laws of the United States—not the banking laws of the State of Georgia. The Georgia courts are per-

fectly competent for the latter. Thus, the defendants' disregard of Georgia's banking laws is only relevant to the issue of whether the effect of the proposd mergers "may be substantially to lessen competition." The Court has already found that substantial competition does not presently exist among the defendants. Possible past violations of Georgia's banking laws cannot change that factual finding. The Court notes that the Supreme Court of Georgia does not appear to consider such violations as may have existed as being more than technical—that is, as negativing the good faith of those involved. [—— Ga. —— (1973), Opinion on Reconsideration, p. 10] To be relevant such violation must involve the issue of potential competition or potentially increased competition. Thus, in *Trans Texas* the district court excluded a situation where there might be "evidence in the record that dissipation of the common control is likely in the future." [—— F. Supp. at ——, 1972 Trade Cases ¶ 74,257 at p. 93, 215] It is clear to the Court that there will be some dissipation of the common stock ownership of the defendant banks due to the Georgia Supreme Court's opinion in *Independent Bankers*. As has been indicated above, however, there is no evidence to show that the five percent defendants have exerted, or since the *Independent Bankers* decision, are exerting, any "threshhold" competitive influence [*i.e., U.S.* v. *Penn Olin Chemical Co.*, 378 U.S. 158 (1964); *U. S.* v *El Paso Natural Gas*, 376 U.S. 651 (1964)] whatsoever vis-a-vis the C&S system. Furthermore, there has been no showing that substantial competition

would arise among the defendants if the common ownership is dissipated to the full extent required by the Supreme Court of Georgia.

Although the Government argues that there have been successful partings of the way in the past as between downtown Atlanta banks and their suburban affiliates, the Court finds the evidence does not show that the markets involved can continue to support, *ad infinitum*, new independent banks in place of affiliated banks. The Government concedes the beneficial effect of the advice and assistance which the downtown banks and others provide the smaller correspondent banks. The record supports the smaller banks' need for such services. There is no evidence of the possibility or feasibility of any arrangement as among the suburban banks, with or without the downtown banks, which would provide the required services in a more competitive manner. The Court is left to speculation and conjecture on this point. Therefore, following the lead of the district court in *Trans Texas* [—— F. Supp. at ——, 1972 Trade Cases ¶ 74,257 at p. 93,210], this Court will consider the findings of the FDIC with respect to the mergers in this case. Weighing the findings of the FDIC (considered by this Court as in the nature of expert testimony only) with the Court's own judgment of the underlying evidence herein, the Court finds that the proposed mergers will not substantially lessen competition, but, in fact, will be pro-competitive, and therefore the Court finds for defendants and against plaintiffs.

In view of the above disposition of the Section 7 issues, the Court does not reach defendants' so-called "subsidiary" defense. Similarly, there is no need to consider the defendants' contention that any anticompetitive effects of the proposed mergers are out-weighed in the public interest by the probable effect of the mergers in meeting the convenience and needs of the communities to be served.

Let judgment enter in favor of defendants.

The statutory stay in effect against the effectuation of the proposed mergers shall expire upon the Government's failure to appeal from this order within the time permitted by law. Otherwise, the proposed mergers shall not be effectuated until the completion of any appeal taken by the Government.

SO ORDERED, this —— day of January, 1974.

/s/ Charles A. Maye, Jr.
United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. 15823

UNITED STATES OF AMERICA, PLAINTIFF

—*vs.*—

THE CITIZENS AND SOUTHERN NATIONAL BANK, ET AL., DEFENDANTS

ORDER

The Court amends *nunc pro tunc* its "FINDINGS OF FACT CONCLUSIONS OF LAW AND ORDER" heretofore entered in this matter on January 25, 1974, by adding to page 54 a footnote at the end of the carry-over paragraph, as follows:

> "[1] The Court has now considered the final order entered by E. D. Dunn, Commissioner of the Georgia Department of Banking and Finance on May 22, 1974, pursuant to the *Independent Bankers* decision. That order does not change the underlying basis of the Court's decision that the proposed mergers will not substantially lessen competition."

As so amended, page 54 reads as follows:

"*ad infinitum*, new independent banks in place of affiliated banks. The Government concedes the beneficial effect of the advice and assistance which the

downtown banks and others provide the smaller correspondent banks. The record supports the smaller banks' need for such services. There is no evidence of the possibility or feasibility of any arrangement as among the suburban banks, with or without the downtown banks, which would provide the required services in a more competitive manner. The Court is left to speculation and conjecture on this point. Therefore, following the lead of the district court in *Trans Texas* [—— F. Supp. at ——, 1972 Trade Cases ¶ 74,257 at p. 93,210], this Court will consider the findings of the FDIC with respect to the mergers in this case. Weighing the findings of the FDIC (considered by this Court as in the nature of expert testimony only) with the Court's own judgment of the underlying evidence herein, the Court finds that the proposed mergers will not substantially lessen competition, but, in fact, will be pro-competitive, and therefore the Court finds for defendants and against plaintiffs.[1]

In view of the above disposition of the Section 7 issues, the Court does not reach defendants' so-called "subsidiary" defense. Similarly, there is no need to consider the defendants' contention that any anticompetitive effects of the proposed mergers are out-

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[1] The Court has now considered the final order entered by E. D. Dunn, Commissioner of the Georgia Department of Banking and Finance on May 22, 1974, pursuant to the *Independent Bankers* decision. That order does not change the underlying basis of the Court's decision that the proposed mergers will not substantially lessen competition."

weighed in the public interest by the probable effect of the mergers in meeting the convenience and needs of the communities to be served.

Let judgment enter in favor of defendants.

The statutory stay in effect against the effectuation of the proposed mergers shall expire upon the Government's failure to appeal from this order within the time permitted by law. Otherwise,

SO ORDERED, this 3rd day of June, 1974.

/s/ Charles A. Maye, Jr.
Judge
United States District Court
for the Northern District
of Georgia

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. 15823

Filed: November 2, 1971

UNITED STATES OF AMERICA, PLAINTIFF

v.

CITIZENS AND SOUTHERN NATIONAL BANK, ET AL., DEFENDANTS

NOTICE OF APPEAL

Notice is hereby given that the United States of America, plaintiff herein, appeals from the Final Judgment and Order of this Court which was entered in this action on January 25, 1974. Such appeal is being taken directly to the Supreme Court of

the United States under authority of Title 15 U.S.C., Section 29.

JOHN W. STOKES, JR.
United States Attorney

/s/ Donald A. Kinkaid
DONALD A. KINKAID

/s/ Kenneth D. Stern
KENNETH D. STERN

/s/ Neal F. Lehman
NEAL F. LEHMAN
Attorneys for Plaintiff

March 25, 1974

APPENDIX D

E. D. "JACK" DUNN
Commissioner

ROBERT M. MOLER
Deputy Commissioner

DEPARTMENT OF BANKING AND FINANCE

STATE OF GEORGIA
Atlanta 30334

May 24, 1974

Gentlemen:

As you are aware, the Supreme Court of Georgia on November 15, 1973, finally ruled in the matter of the Independent Bankers Association of Georgia vs. W. M. Jackson, Superintendent of Banks (now E. D. Dunn, Commissioner of Banking and Finance), The Citizens and Southern National Bank, the Citizens and Southern Holding Company, et al. As a result of that decision, the Commissioner is required by the Court to take such action as he deems necessary to bring about a divestiture of what the Court has determined is direct and indirect control of certain banks in this State by the Citizens and Southern Holding Company and/or The Citizens and Southern National Bank.

In compliance with the Order of the Court and in conformance with its decisions in this case as interpreted by the Department and the Attorney General of this State, attached hereto is the final Order in this matter. For purposes of this Order, "ten five percent banks" and similar phrases shall mean:

The Citizens and Southern Bank of Thomas County, Thomasville

The Citizens and Southern Bank of Milledgeville, Milledgeville

The Citizens and Southern Bank of Hart County, Hartwell

First State National Bank, Bainbridge

The Citizens and Southern Bank of Dalton, Dalton

The Citizens and Southern South DeKalb Bank, Decatur

The Citizens and Southern Bank of Cobb County, Austell

The Citizens and Southern Bank of Tifton, Tifton

The Citizens and Southern Bank of Colquitt County, Moultrie

The Citizens and Southern Bank of Jackson, Jackson

"Bankable loan" shall mean loans which mature in not more than five years, or, if amortized by at least annual payments on the principal, in not more than thirty years, and which call for a rate of interest payable by the borrower which is not less than the rate of charge by the bank to other bankers outside their employment or charged uniformly to all of its own employees; collateral securing such "bankable loans" shall have an appraised value equal to not less than 120% of the amount of the loans.

While the Order is required to be directed only to the codefendants in the suit decided by the Supreme Court of Georgia under appeal from the Superior Court of DeKalb County, the responsibilities of the

Commissioner under The Banking Laws demand that the Order be extended to all other banks which are found to be similarly situated. Accordingly, IT IS ORDERED that

The Citizens and Southern Park National Bank, Atlanta

The Cartersville Bank, Cartersville

The Citizens and Southern Bank of Chamblee, Chamblee

The Citizens and Southern Bank of Rockdale, Conyers

The Citizens and Southern Bank of Clayton County, Forest Park

The Citizens and Southern Bank of Henry County, McDonough

The Citizens and Southern Bank of Gwinnett, Norcross

The Citizens and Southern Bank of North Fulton, Roswell

The Citizens and Southern Bank of Sandy Springs, Atlanta

Farmers and Merchants Bank of Senoia, Senoia

The Citizens and Southern Springfield Bank, Springfield

The Citizens and Southern Bank of Tucker, Tucker

The Citizens and Southern Bank, Warner Robins

The National Bank of Fitzgerald, Fitzgerald

The National Bank of Walton County, Monroe

will fully comply with the Order attached hereto as if each of these banks had been included as codefendants and that The Citizens and Southern National Bank and the Citizens and Southern Holding Company shall treat their relationship in all respects with these banks as if they had been included among the "ten five percent banks."

Any interested party who feels that any five percent bank which was not a codefendant in the Independent Bankers Association of Georgia action should not be subject to the same ORDER as herein set down may file written objections with the Department within thirty days of the date of these Orders. Such Orders shall not be effective against those banks for which objections have been filed on a timely basis. The Commissioner reserves the right to issue a valid new Order as to that bank upon the occurrence of one of the following:

(1) Failure by the person filing the objections to file written evidentiary support for his objections in detail within thirty days of the date objections are originally filed; or
(2) A determination by the Commissioner after proper hearing in accordance with the Administrative Procedures Act that such bank should not be exempt from the Orders contained hereinabove.

Implementation of these Orders will require certain filings with the Department and the Federal Deposit Insurance Corporation pursuant to Sections of The Banking Law and the Federal Deposit Insurance Act

and Regulations. Oath of Directors forms are included for reporting election by the Board to fill directors' positions vacated in accordance with the Orders, and each new director must complete a Biographical and Financial Information Report. Copies of both reports bearing original signatures should be submitted to the Department and the FDIC under a transmittal letter stating the name of the director being replaced. Similar procedures should be followed where officer positions are changed as a result of these Orders. After required divestitures of stock have been made, Change of Ownership Reports must be filed with the Department and the Federal Deposit Insurance Corporation and forms are enclosed for that purpose. Original signatures must be contained on copies filed with the Department and the FDIC. The filing of these reports is in addition to and does not limit the requirements of Paragraph 11 of the Order.

It is the sincere desire of the Department that implementation of the Orders and proceedings can occur with a minimum disruptive effect on the affairs of the banks involved and that sound operations and management stability will not be adversely affected. In the event that serious disruptive effects cannot be avoided, the Department should be notified immediately by a request for special instructions or temporary waivers of time limitations imposed by the Order. Such requests will be considered individually with respect to each bank making the requests in light of the seriousness of the disruption and the re-

sponsibilities of the Department and all other parties under the Court Order and the interpretations rendered by the Courts.

Requests for interpretations, special instructions, and individual consultations by the Department on all matters contained herein must be submitted in writing and will not be considered on verbal presentment as with other matters under the general supervision and interpretation of the Department. With the cooperation of all parties, compliance with the directions and interpretations of the Courts should not seriously affect the operation of your institution.

Yours very truly,

E. D. DUNN
Commissioner

EDD:rst
Attachment

ORDER

May 22, 1974

As directed by the Superior Court of DeKalb County, IT IS ORDERED:

1. That The Citizens and Southern National Bank and the Citizens and Southern Holding Company shall terminate any direct or indirect supervision of the ten five percent banks beyond that which is available from The Citizens and Southern National Bank or the Citizens and Southern Holding Company to any bank that wishes to enter into a correspondent relationship with such bank or holding company. Such correspondent services shall be available to any contracting bank on an equitable basis with other banks consistent with sound banking principles.

2. That any officer or director of The Citizens and Southern National Bank or the Citizens and Southern Holding Company or any of their subsidiaries who serves as a director or as an officer of any of the ten five percent banks shall resign from the offices held in one or the other of such banks and any officer or director of The Citizens and Southern National Bank or the Citizens and Southern Holding Company or their subsidiaries shall be prohibited from simultaneously acting as a director or officer of any of the ten five percent banks.

3. That any officer or director of The Citizens and Southern National Bank or the Citizens and Southern Holding Company who participates or has authority to participate in major policy-making func-

tions of that bank and company and (1) who acquired shares of stock in any of the ten five percent banks in connection with the acquisition by the Citizens and Southern Holding Company of its five percent ownership in any of the ten five percent banks, (2) who acquired such shares from any other such officer or director who had acquired those shares in connection with the acquisition by the Citizens and Southern Holding Company of its five percent ownership of any such bank or (3) who acquired such shares in connection with a loan to him by the Citizens and Southern Holding Company, The Citizens and Southern National Bank, or their subsidiaries unless said loans are made bankable loans as herein defined, shall divest himself of shares so acquired. For purposes of sub-paragraph (1) and (2) above, shares in any of the ten five percent banks, acquired by any of the above officers or directors within a period of six months from the date of the acquisition by the Citizens and Southern Holding Company of its five percent interest, were acquired in connection with the acquisition by the Citizens and Southern Holding Company of its five percent interest within the meaning of this paragraph. "Divest" means the gift, except to a spouse or minor child, or sale of the legal and beneficial interest in shares, without the right to reacquire for as long as the divesting officer or director remains an officer or director of The Citizens and Southern National Bank or the Citizens and Southern Holding Company. No officer or director required to divest by this Order

shall retain after the divestiture any security interest in the stock as to which divestiture is required. No divestiture shall be to any other officer or director who is himself required to divest by this Order.

4. That The Citizens and Southern National Bank and the Citizens and Southern Holding Company and their subsidiaries shall terminate any loan made to any former officer or employee of The Citizens and Southern National Bank or the Citizens and Southern Holding Company or any of their subsidiaries who shall have become an executive officer of any of the ten five percent banks where such loan was secured by or was made to enable such former officer or employee to purchase shares of stock in any of the ten five percent banks of which he became an executive officer unless such loans are made bankable loans as herein defined.

5. That The Citizens and Southern National Bank and the Citizens and Southern Holding Company and their subsidiaries shall terminate any loan made to any officer of any such banks or companies, other than those officers covered by paragraph 3 hereof, made to enable such officer to purchase, or which was secured by, shares of stock in any of the ten five percent banks if such stock was acquired within six months of, or acquired from any director, officer or shareholder of The Citizens and Southern National Bank or the Citizens and Southern Holding Company or any of their subsidiaries who originally acquired the shares of stock within six months of, the acquisition by the Citizens and Southern Holding Com-

pany of its five percent interest in these ten five percent banks unless such loans are made bankable loans as herein defined.

6. That The Citizens and Southern National Bank and the Citizens and Southern Holding Company and their subsidiaries shall terminate all loans made to any shareholder of The Citizens and Southern National Bank which were made for the purpose of enabling such shareholder to purchase shares of stock in the ten five percent banks where such loan was made or such shares were acquired within six months of the acquisition by the Citizens and Southern Holding Company of its five percent shares in such bank unless such loans are made bankable loans as herein defined.

7. That The Citizens and Southern National Bank, the Citizens and Southern Holding Company and their subsidiaries shall make no loan to enable any officer, director, or shareholder (including husband, wife, or minor children of any of these) of the ten five percent banks to purchase shares of stock in any of the ten five percent banks unless such loan is made a bankable loan as herein defined, and no such loan may be secured by the stock being purchased.

8. That all outdoor signs, advertising and similar written materials externally disseminated by the ten five percent banks show the portion of the bank's name which distinguishes that bank from The Citizens and Southern National Bank, i.e., if The Citizens and Southern South DeKalb Bank uses the C&S logo,

the words "South DeKalb Bank" shall be printed in conjunction with the logo letters in such manner as to be, in the opinion of the Commissioner, clearly legible. In all cases other than outdoor signs and advertising in public media, existing stock of supplies may be utilized notwithstanding the time limitations of paragraph 10.

9. That the Citizens and Southern Holding Company divest itself of its stock in the ten five percent banks if the stockholders of The Citizens and Southern National Bank, including fiduciary accounts administered by its trust department, own sufficient stock in such banks to make the total of the stock held by the Citizens and Southern Holding Company and the stockholders of The Citizens and Southern National Bank, including stocks held in a fiduciary capacity by the trust department of The Citizens and Southern National Bank or any of its subsidiary banks where the beneficiary of the trust is a stockholder of The Citizens and Southern National Bank, exceed five percent of the stock of such five percent bank. "Divest" means the sale of the legal and beneficial interest in such stock, without the right to reacquire.

10. All action herein required shall be completed on or before the following dates:

Paragraph 1	May 24, 1975
Paragraph 2	June 1, 1974
Paragraph 3	May 24, 1975
Paragraph 4	November 1, 1974
Paragraph 5	November 1, 1974

Paragraph 6	November 1, 1974
Paragraph 7	Continuous
Paragraph 8	November 1, 1974
Paragraph 9	November 1, 1974

11. The Commissioner or his duly appointed representative may make periodic examinations pursuant to the provisions of Section 13-207 of the Code of Georgia to determine compliance with this Order when in the discretion of the Commissioner such examinations are appropriate. The Commissioner may examine any transaction required by this Order to ensure that such transaction complies with this Order and the banking law of Georgia as interpreted by the Georgia Supreme Court. Such examination may include any relevant considerations, including but not limited to, the price paid and received for stock being divested, the financing arrangements for the sale and purchase of stock being divested, the intent of the parties to such transactions, the relation of the parties to the transactions to each other, the relation of the parties to the transactions to The Citizens and Southern National Bank or the Citizens and Southern Holding Company and any other consideration deemed relevant by the Commissioner of Banking and Finance. The Commissioner of Banking and Finance may after notice and opportunity for hearing, order rescission of any transaction which he finds, after full consideration of the factors deemed relevant by him, to result in the acquisition or holding of shares by anyone in violation of this Order or the banking law of Georgia. Any transaction not

ordered to be rescinded within one hundred and twenty days from the date of disclosure to the Commissioner shall be deemed valid and in compliance with this Order. The Commissioner reserves the right to amend or modify this Order based upon his findings at examinations or investigations herein provided.

E. D. DUNN
Commissioner
Department of Banking and Finance

Notary Public

APPENDIX E

Section 7 of the Clayton Act, 38 Stat. 731 as amended, 64 Stat. 1125, 15 U.S.C. 18, provides in pertinent part:

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

Section 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 1, provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states * * * is hereby declared to be illegal * * *.

Subsection 5(B) of the Bank Merger Act of 1966, 80 Stat. 8, as amended, 12 U.S.C. 1828(c)(5)(B), provides in pertinent part:

> The [Federal Deposit Insurance Corporation] * * * shall not approve—
>
> * * * * *
>
> (B) any other proposed merger transaction whose effect in any section of the country may be substantially to lessen competition, or tend to create a monopoly, or which in any other maner

would be in restraint of trade, unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.

In every case, the [Federal Deposit Insurance Corporation] * * * shall take into consideration the financial and managerial resources and future prospects of the existing and proposed institutions, and the convenience and needs of the community to be served.

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